

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,
PETITIONER,

vs.

JESS G. READ, INSURANCE COMMISSIONER FOR
THE STATE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE TENTH CIRCUIT

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 2663

GREAT NORTHERN LIFE INSURANCE COMPANY, a corporation,
Appellant,

vs.

JESS G. READ, Insurance Commissioner for State of Oklahoma,
Appellee

STATEMENT OF POINTS TO BE RELIED UPON—Filed Dec. 14,
1942

Comes now the above named appellant, Great Northern Life Insurance Company, and states that the points upon which it intends to rely in this court in this case are as follows:

1. The objection that this is a suit against the state could not properly be raised by the appellee for the first time on the trial date.
2. A suit against a state officer acting under an unconstitutional statute is not a suit against the state in violation of the Eleventh Amendment to the Constitution of the United States.
3. Chapter 1a, Title 36, Sessions Laws of Oklahoma of 1942 (House Bill 353 of the 18th Legislature), which levies an annual tax of 4% upon the gross premiums collected in Oklahoma by foreign life insurance companies is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States in that it deprives this appellant of the equal protection of the law.
4. Said act is unconstitutional for the further reason that the tax levied thereby is diverted to uses and purposes not authorized by the Constitution and laws of Oklahoma and not in a manner authorized by the Constitution and laws of Oklahoma.
5. The 4% tax rate levied by said act applies only to [fol. 2] premiums collected after April 25, 1941, its effective

date, and not to all premiums collected during the year 1941, and as applied to all premiums collected during the year 1941, the same is unconstitutional and a violation of due process of law.

Henry S. Griffing, John A. Johnson, Attorneys for Appellant.

A copy of the foregoing Statement of Points to be Relied Upon was served upon Fred Hansen as attorney for Appellee by mail on the tenth day of December, 1942.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS

DESIGNATION OF ENTIRE RECORD TO BE PRINTED—Filed Dec.
21, 1942

Great Northern Life Insurance Company, the appellant, through its attorneys of record, hereby designates the entire certified typewritten transcript of the record for printing herein, including the following:

1. The Complaint, including exhibit.
2. The Summons and Return.
3. Answer of Defendant.
4. Transcript of proceedings at Pre-Trial Hearing.
5. Supplement to Complaint.
6. Answer to Supplement to Complaint.
7. Stipulation of Facts, including exhibits.
8. Journal Entry of Judgment by Honorable Lucius Babcock with Motion for its introduction, objection by the Plaintiff and ruling by the Court thereon.
9. Findings of Fact by the Court.
10. Direction for Entry of Judgment.
11. Conclusions of Law by the Court.
12. Decree of the Court.
13. Notice of Appeal.
14. Cost Bond.
- [fol. 3] 15. Designation of entire record and proceedings for inclusion in the record on appeal.

16. Designation of entire record and proceedings for printing.

Dated this 18th day of December, 1942.

Great Northern Life Insurance Company, by Henry S. Griffing, John A. Johnson, Its Attorneys.

Jess G. Read, appellee herein, through his attorneys of record, acknowledges receipt of a copy of the foregoing Designation of the Entire Record to be Printed herein on this 18th day of December, 1942.

Mac Q. Williamson, by J. B., Attorney General of the State of Oklahoma; Fred Hansen, by J. B., Assistant Attorney General of the State of Oklahoma, Attorneys for Appellee.

[File endorsement omitted.]

[Caption omitted]

[fol. 4] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

GREAT NORTHERN LIFE INSURANCE COMPANY, a corporation,
Plaintiff,

No. 1009. vs. Civil

JESS G. READ, Insurance Commissioner for State of Oklahoma, Defendant

COMPLAINT—Filed March 28, 1942

1

Plaintiff is a corporation incorporated under the laws of the State of Wisconsin, but having a permit to do business under the laws of the State of Oklahoma, and defendant is a citizen of the State of Oklahoma. This action arises under the Fourteenth Amendment to the Constitution of the United States, Section 1, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and cost, the sum of Three Thousand (\$3000.00) Dollars.

Plaintiff was licensed to do business in the State of Oklahoma on December 5, 1922, under a charter authorizing it to make and grant non-participating contracts of insurance upon the lives of individuals, and on December 28, 1922, it was authorized by the State of Oklahoma to solicit and provide policies of Health and Disability insurance. For each year since said dates, plaintiff has continued in business in the State of Oklahoma and has annually paid its license fee of Three Hundred (\$300.00) Dollars. Plaintiff has paid to the defendant, Jess G. Read, as Insurance Commissioner of the State of Oklahoma, Three Hundred (\$300.00) Dollars as its license fee to do business in Oklahoma for the year [fol. 5] 1942, and now is and was at all times hereinafter mentioned a person within the jurisdiction of the State of Oklahoma.

In the conduct of its business of soliciting and writing policies of insurance, plaintiff has obtained contracts of insurance with approximately six thousand policyholders within Oklahoma and has employed and trained forty-five agents throughout the various counties of the state. It has gathered and filed a large and valuable quantity of factual and medical information concerning its policyholders and has built up a large and profitable business which is not subject to lease or sale to other persons. Its property is devoted to a limited use by the plaintiff, and is not susceptible to use by other persons. Plaintiff is threatened with deprivation of this property and investment by the collection under duress by the defendant, as Insurance Commissioner of Oklahoma, of certain taxes levied under color of certain laws of the State of Oklahoma, hereinafter more specifically indicated.

Under the provisions of Sections 1 and 2, Article XIX of the Constitution of Oklahoma and Section 10478, Oklahoma Statutes of 1931 and Chapter 1a, Title 36, Session Laws of Oklahoma of 1941, being House Bill 353 of the Eighteenth Legislature of Oklahoma, an annual tax of 4% has been levied upon all premiums collected in Oklahoma by every foreign insurance company, including this plaintiff. By coercion and duress, defendant has collected this tax from the plaintiff for the year 1942, in addition to the annual

license fee of Three Hundred (\$300.00) Dollars. As required by the Oklahoma laws challenged herein, plaintiff paid said tax in the amount of Eight Thousand One Hundred Ninety-Eight and 31/100 (\$8,198.31) Dollars involuntarily and under protest and for the purpose of avoiding the burdensome penalties threatened to be imposed and to prevent cancellation of the right of the plaintiff to continue in business within the State of Oklahoma. Payment under protest was made on the 28th day of February, 1942, and was accompanied by a formal protest served upon defendant and Carl B. Sebring, State Treasurer of the State of Oklahoma, a true copy of which formal protest is marked [fol. 6] Exhibit "A," attached hereto and incorporated herein.

5

Domestic insurance companies incorporated in and existing under the laws of the State of Oklahoma have been at all times and are now authorized by charter to solicit and write contracts of insurance identical with those made and granted by the plaintiff, and such domestic life insurance companies obtain and write such contracts of insurance in a manner identical with that of the plaintiff. No premium tax is levied upon or collected from such domestic corporations by the provisions indicated in Paragraph 4 herein, and life insurance companies incorporated in the State of Oklahoma are not required to bear the onerous tax burden imposed upon plaintiff under color of the provisions indicated in Paragraph 4. Plaintiff therefore says that the gross premium tax of Eight Thousand One Hundred Ninety-Eight and 31/100 (\$8,198.31) Dollars involuntarily paid is unconstitutional, illegal, excessive and void for the reason that Section 10478, Oklahoma Statutes 1931 and Chapter Ia, Title 36, Session Laws of Oklahoma, 1941, being House Bill 353 of the Eighteen- Legislature of Oklahoma, and Sections 1 and 2 of Article XIX of the Oklahoma Constitution are unconstitutional and in contravention of the Fourteenth Amendment to the Constitution of the United States, Section 1, in attempting to impose taxes exclusively upon the plaintiff after it was duly admitted to the State of Oklahoma; and not upon domestic insurance corporations doing the identical type and kind of business within the State of Oklahoma. Plaintiff says that such Acts and such State Constitutional sections, in attempting to levy an arbitrary and discriminatory tax upon the plaintiff while it was a

person within the jurisdiction of the State of Oklahoma, possessed of property, investment, and business which it had built up since 1922, and while plaintiff was entitled to the equal protection of the laws, seek to deprive the plaintiff of its rights under the Fourteenth Amendment of the Federal Constitution. Plaintiff says that the acts of the defendant as Insurance Commissioner of Oklahoma in enforcing said revenue measures by receiving and collecting the taxes on the gross premiums of the plaintiff is in contravention of the Fourteenth Amendment to the Constitution [fol. 7] of the United States. All of the statutes and the state Constitutional provisions indicated and action of the defendant deny to the plaintiff the equal protection of the laws.

The foregoing taxes purportedly imposed upon premiums collected by foreign insurance companies in Oklahoma by Section 1, Chapter Ia, House Bill 353, Session Laws of Oklahoma 1941, Page 121, and said Act, are each unconstitutional and void for the further reason that the premium taxes are diverted by the said Act to uses and purposes not authorized by the Constitution and laws of Oklahoma and in a manner not authorized by the Constitution and laws of Oklahoma.

The illegality of the tax herein arises by reason of action of the defendant from which the laws provide no appeal.

Wherefore, plaintiff prays:

(1). That it have judgment against the defendant in the sum of Eight Thousand One Hundred Ninety-Eight and 31/100 (\$8,198.31) Dollars.

(2). In the alternative, if for any reason the court should find that plaintiff is not entitled to such judgment, plaintiff prays that your Honorable Court will enter a decree in the nature of mandamus, commanding defendant to deliver to plaintiff, or cause to be repaid to it, the sum of Eight Thousand One Hundred Ninety-Eight and 31/100 (\$8,198.31) Dollars.

(3). That plaintiff have such other and further relief as is just.

Henry S. Griffing, John A. Johnson, Attorneys for Plaintiff, 2701 First National Bldg.

[fol. 8]

EXHIBIT "A" TO COMPLAINT

7

Protest of Great Northern Life Insurance Company

To Jess G. Read, Insurance Commissioner of the State of Oklahoma, State Capitol, Oklahoma City, Oklahoma.

To Carl S. Sebring, State Treasurer of the State of Oklahoma, State Capitol, Oklahoma City, Oklahoma.

GENTLEMEN:

You and each of you are hereby notified that Great Northern Life Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and having its principal place of business at Milwaukee, the State of Wisconsin, does herewith pay to the said Insurance Commissioner of the State of Oklahoma the sum of Eight Thousand One Hundred Ninety-Eight and 31/100 (\$8,198.31) Dollars, demanded by said Insurance Commissioner, said sum being the amount of tax alleged to be assessed and levied against the undersigned under and by virtue of Section 10478, Oklahoma Statutes 1931 and Chapter Ia, Title 36, Session Laws of Oklahoma, 1941, otherwise known as House Bill 353, enacted by the Eighteenth Legislature, approved April 25, 1941, on all premiums collected in the State of Oklahoma by the undersigned within the twelve months next preceding the first day of January, 1942; said sum so paid being four per cent (4%) of such premiums, less deductions allowed by law.

That the amount of such tax upon said premiums collected by the undersigned in said state during the period beginning January 1, 1941 and ending April 25, 1941, the date of the approval of said act, is the sum of One Thousand Three Hundred Ten and 34/100 (\$1,310.34) Dollars; that the amount of such tax upon such premiums collected by the undersigned in said state during the period beginning April 25, 1941 and ending December 31, 1941, was and is the sum of Six Thousand Eight Hundred Eighty-seven and 97/100 (\$6,887.97) Dollars.

That said payment includes the following amounts which

your protestant alleges are unconstitutional, illegal, excessive and void, to-wit:

That said tax in the sum of Eight Thousand One Hundred Ninety-eight and 31/100 (\$8,198.31) Dollars, being the aggregate [fol. 9] of the aforesaid sums paid under protest, so alleged to be unconstitutional, illegal, excessive and void, is paid involuntarily, under duress and compulsion and under protest and only in response to the demand of said Insurance Commissioner; that said tax so paid under protest is unconstitutional, illegal, excessive and void for the reason and upon the grounds that said Act of April 25, 1941, does not impose said taxes upon this protestant and said Act should not be construed as imposing such taxes on this protestant; that said Act is a revenue measure, and the taxes sought to be imposed thereby are sought to be imposed exclusively upon protestant and other foreign insurance companies doing business in the State of Oklahoma, and not upon domestic insurance companies doing business within the State of Oklahoma; that such Act attempts to levy an arbitrary and discriminatory tax upon protestant after it was duly admitted to the State of Oklahoma and while it was and is a quasi citizen thereof, a person within its jurisdiction and entitled to the equal protection of the laws; that by reason of the foregoing and other substantial grounds, said legislative acts purporting to assess said taxes and the acts of said Insurance Commissioner in demanding, receiving and collecting said taxes are each in contravention of the Constitution and laws of the United States of America, in that the same constitute and are a taking of the property of the undersigned without due process of law, as prohibited by the Fifth and Fourteenth Amendments to the Constitution of the United States of America and as prohibited by the Constitution of the State of Oklahoma, and constitute and are a denial to the undersigned of the equal protection of the laws, as prohibited by the Fourteenth Amendment to the Constitution of the United States of America and the provisions of the Constitution of the State of Oklahoma; that in paying said tax under protest, the undersigned relies upon and expressly invokes the protection of all the applicable provisions of the Constitution and laws of the State of Oklahoma and the Constitution and laws of the United States.

of America, including (but not excluding others) the Fifth and Fourteenth Amendments to the Constitution of the United States of America, prohibiting the taking of property without due process of law and prohibiting the denial to any person of the equal protection of the laws.

[fol. 10] You and each of you are hereby further notified that said tax so paid under protest, in the sum of Eight Thousand One Hundred Ninety-eight and 31/100 (\$8,198.31) Dollars, is unconstitutional; illegal, excessive and void and that said Insurance Commissioner is without power, authority or jurisdiction to assess, levy or collect the same, and that said tax is paid involuntarily and under protest for the purpose of avoiding burdensome penalties threatened to be imposed and to prevent the cancellation of the license of protestant to transact business within the state. Demand is hereby made that said sum so paid under protest, to-wit: The sum of Eight Thousand One Hundred Ninety-eight and 31/100 (\$8,198.31) Dollars, be repaid and refunded to the undersigned protestant.

You and each of you are further notified that said taxes purportedly imposed upon premiums collected by foreign insurance companies in Oklahoma under and by virtue of Section 1, Chapter I-a, House Bill 353, Session Laws Oklahoma 1941, page 121, and said act, are each and all unconstitutional and void for the further reason that such premium taxes are diverted by said act to uses and purposes not authorized by the Constitution and laws of Oklahoma and in a manner not authorized by the Constitution and laws of Oklahoma, and all of which is expressly prohibited by Article XIX of the Constitution of the State of Oklahoma.

You and each of you are further notified that unless said sum so paid under protest is repaid that protestant will, at the time and in the manner provided by law, institute suit for the recovery of the same, or take other appropriate action to protect its legal rights, and that you and each of you shall segregate said fund and hold the same in a separate account and not pay the same into the State Treasury of this State for a period of thirty days from this date, and that if suit be filed within such period, that such fund so segregated shall be further held pending the outcome of said suit, all as provided by law.

This protest is executed in duplicate this 28th day of February, 1942.

Great Northern Life Insurance Company, by Henry S. Griffing, Its Attorney.

[fol. 11]

Receipt

Receipt of duplicate original of the protest, of which the within and foregoing is a full, true and correct copy is hereby acknowledged at the time of the payment of the tax therein mentioned.

Jess G. Read, Insurance Commissioner of the State of Oklahoma, by Andy Crosby, Jr., C. B. Sebring, State Treasurer of the State of Oklahoma.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SUMMONS AND RETURN

To the above named Defendant:

You are hereby summoned and required to serve upon John A. Johnson, plaintiff's attorney, whose address 2701 First National Building, Oklahoma City, Oklahoma, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Theodore M. Filson, Clerk of Court, by Margaret P. Blair, Deputy Clerk. (Seal of Court.)

Date: March 28, 1942.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 28th day of March, 1942, I received the within summons at Oklahoma City, Oklahoma, and executed the same by leaving a true

copy of the summons, together with copy of complaint, for Jess G. Read, Insurance Commissioner of the State of Oklahoma, with Andy Crosby, Jr., Assistant Insurance Commissioner, of the State of Oklahoma, at Oklahoma City, [fol. 12] Oklahoma, this 28th day of March, 1942, the Chief Office not found in this district.

Marshal's Fees

Travel.....	\$	
Service.....		2.00

Dave E. Hilles, United States Marshal, by Jasper Saunkeah, Deputy United States Marshal.

Returnable not later than 20 days after service.

Filed March 31, 1942.

Theodore M. Filson, Clerk, by Margaret P. Blair,
Deputy.

IN UNITED STATES DISTRICT COURT

ANSWER—Filed August 19, 1942

Comes Now the above defendant and in answer to the complaint filed herein, alleges and states:

(1) The court lacks jurisdiction because plaintiff has brought a cause of action, identical to this cause of action, against defendant in the District Court of Oklahoma County, Oklahoma, which cause of action is still pending.

(2) The complaint fails to state a claim against defendant upon which relief can be granted.

(3) The court lacks jurisdiction because said complaint seeks, in the alternative, a decree in the nature of mandamus against defendant.

(4) Defendant denies all material allegations of fact set forth in the complaint, except such allegations as are hereinafter specifically admitted.

(5) Defendant admits the allegations contained in paragraph 1 of the complaint.

(6) Defendant admits the allegations contained in paragraph 2 of the complaint which state that plaintiff was licensed to do business in the State of Oklahoma on Decem-

ber 5, 1922, under a (Wisconsin) charter authorizing it to make and grant non-participating contracts of insurance [fol. 13] upon the lives of individuals, and that on December 8, 1922, it was authorized by the State of Oklahoma to solicit and provide policies of health and disability insurance in said State, and alleges that plaintiff was so licensed and authorized for the license year ending February 28, 1923. Defendant also admits and alleges that plaintiff has been so licensed and authorized for each license year thereafter, same being a period beginning March 1 of each calendar year and ending on February 28 of the succeeding calendar year. Defendant further admits and alleges that plaintiff has paid to defendant the sum of \$300.00 as an "entrance fee" for each of said license years and, at the conclusion thereof, also paid to defendant a tax of two per centum, or four per centum, as required by law, on all premiums collected by it in this State during the preceding calendar year, less proper deductions, for the privilege of having been so licensed and authorized during said license year, and that at all times during each of said license years plaintiff has been, and is now, a "person within the jurisdiction of the State of Oklahoma."

(7) Defendant admits the allegations of paragraph 3 of the complaint which relate to the conduct of its business, the gathering and filing of information concerning its policy-holders, and the building up and nature of its business and the limited use thereof, but denies that plaintiff is threatened with the deprivation of its said property by reason of the collection of the tax sought to be recovered by plaintiff in this action, and alleges that said taxes were and are validly levied and collected, and that same were not collected by, or paid to, defendant under duress.

(8) Defendant admits the allegations of paragraph 4 of the complaint which state that the 4% premium tax involved in this case was levied under the provisions of Sections 1 and 2, Article 19, of the Constitution of Oklahoma, and Chapter Ia, Title 36, Oklahoma Session Laws 1941 (36 O. S. 1941 § 104), but denies that said tax was levied under the provisions of Section 10478, O. S. 1931, and also denies that said tax for the current license year, to-wit: a period beginning March 1, 1941, and ending February 28, 1942, was illegally levied or collected under "coercion and duress." Defendant admits, however, that when plaintiff paid the

[fol. 14] \$8,198.31 of premium taxes sought to be recovered here, same was accompanied by the notice of protest attached as Exhibit "A" to its complaint.

(9) Defendant admits the allegations of paragraph 5 of the complaint which state that under the laws of Oklahoma, domestic life insurance companies authorized to write contracts of insurance identical with those of plaintiff are not required to pay a premium tax thereon, but denies that by reason thereof Section 10478, O. S. 1931, Chapter 1a, Title 36 Oklahoma Session Laws 1941 (36 O. S. 1941 § 104), and Sections 1 and 2, Article 19, of the Constitution of Oklahoma, contravene the 14th Amendment of the Constitution of the United States, and also denies that defendant, in collecting the tax sought to be recovered here, did so in contravention of said Amendment.

(10) Defendant denies the allegations of paragraph 6 of the complaint which state that premium taxes imposed upon premiums collected by foreign insurance companies in Oklahoma by Section 1, Chapter 1a, Title 36, Oklahoma Session Laws 1941 (36 O. S. 1941 § 104), are unconstitutional and void for the reason that said taxes are diverted by said Act to uses and purposes not authorized by the Constitution and laws of Oklahoma and in a manner not authorized thereby, and alleges that said taxes are not diverted to any use or purpose not authorized by the Constitution and laws of Oklahoma.

Wherefore, premises considered, defendant respectfully asks the court to deny plaintiff the relief prayed for in its complaint, and to render judgment in favor of defendant and against plaintiff, and for all costs of this suit.

Mac Q. Williamson, Attorney General, Fred Hansen,
Assistant Attorney General, Andy Crosby, Jr.,
Attorneys for Defendant.

(Verification omitted.)

[fol. 15] Service of a copy of the above Answer is hereby acknowledged and consent given to file same out of time.

Dated this 20th day of August, 1942.

John A. Johnson.

Consent given to file out of time. Dated this 19 day of August, 1942.

Edgar S. Vaught, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Pretrial Conference and Hearing at Oklahoma City, Oklahoma, on September 15, 1942, Before Honorable Bower Broaddus, Judge

APPEARANCES: John A. Johnson, Esq., appearing for the Plaintiff; Fred Hanson, Esq., Assistant Attorney General, appearing for the Defendant.

RECORDED PROCEEDINGS

The Court: If you will take your Petition, I think we can agree on substantially all the allegations.

Mr. Hanson: If the court please, could I make one suggestion? Counsel, Mr. Johnson, desires to amend his Petition, which is satisfactory to us, to bring up some angles that he has not presented in his original complaint.

The Court: Do you have your amendment ready?

Mr. Johnson: No, sir; we have just recently discussed that feature; I don't have it ready yet, your honor.

The Court: We will go by the complaint and when we get through we will take that up. I will allow the amendment but in order to keep some regularity so you will know what I am talking about, let's follow the original complaint, and I will permit the amendment to include certain additional allegations.

Mr. Hanson: Yes, sir.

[fol. 16] The Court: The first paragraph is on the question of jurisdiction. Is diversity of citizenship admitted? Do you admit that this court acquired jurisdiction on diversity of citizenship, and that there is more than \$3,000.00 involved?

Mr. Hanson: We admit that there is \$3,000.00 involved, but he doesn't plead diversity of citizenship.

The Court: He wouldn't have to under the pleadings.

The Court: It is asserted that there is a similar action pending in the State Court. Do you think that would affect the jurisdiction of this court?

Mr. Hanson: If the court please, that case has been dismissed, and I presume that ground would be removed, whether or not it would affect it.

The Court: All right. The allegation as to the licensing on December 5, 1922 to grant non-participating contracts of insurance has been admitted by your pleadings?

Mr. Hanson: Yes, sir.

The Court: On December 28, 1922, he was authorized to solicit and provide for health and disability insurance you admit that.

Mr. Hanson: Yes, sir.

The Court: Since the original date of December 5th the company has been in business and has paid all license fees, you admit that.

Mr. Hanson: We admit that.

The Court: You also admit the number of policyholders in paragraph 3?

Mr. Hanson: Correct.

The Court: 45 agents, and they have obtained a great deal of information and built up a profitable business, you admit that?

Mr. Hanson: We admit that.

The Court: You deny, though, that the taxing laws are depriving them of profit?

[fol. 17] Mr. Hanson: Yes, sir.

The Court: That is the question of law in this case, and the only one?

Mr. Hanson: Yes, sir.

The Court: You admit the tax of four per cent was imposed under the statute?

Mr. Hanson: Yes, sir.

The Court: Here is an allegation that you paid it under coercion and duress, you paid it under protest. Wouldn't that be sufficient under the statute?

Mr. Hanson: He paid it under protest and notice of, written notice of protest, which notice we admit, and which is attached to his Petition.

The Court: He wouldn't have to pay it under coercion and duress, would he, under the law?

Mr. Hanson: No, sir, he could pay it under protest and he could sue to recover within 30 days, and they did file suit within 30 days.

The Court: Then, we are not concerned with the coercion and duress at all. That will be the theory of the case from now on, and he is confined to it and you are confined to it too.

Mr. Hanson: Yes, sir.

The Court: They allege as to domestic insurance companies similar tax was not imposed. Is that admitted?

Mr. Hanson: That is admitted.

The Court: The sixth paragraph, that it is unconstitutional and void. That is a mere conclusion. You allege in your answer lack of jurisdiction because it seeks a mandamus. I don't think that relief would require a mandamus in this case, would it?

Mr. Hanson: In his prayer he asks to recover, and if not, that writ of mandamus issue.

The Court: I have no authority to issue a mandamus.

Mr. Johnson: We admit that, so we seek only relief.

[fol. 18] The Court: You have purely questions of law in this case under those admissions.

Mr. Johnson: Yes, sir.

Mr. Hanson: Your Honor, I talked with counsel, and he has some proof that he would want to put on, and I would want to put on a little proof as to administrative interpretation and practice. We can stipulate that and file a short stipulation and cover all of the evidence which either of us desire.

The Court: You file your briefs. Let's see, I will set this down for trial. Evidently, you don't both understand what the other insists upon.

Mr. Hanson: Yes, sir, we tried it once in the State Court.

The Court: How about trying this case on Wednesday, October 14th?

Mr. Hanson: That is satisfactory with the State.

The Court: I will permit you to orally argue it at that time.

Mr. Hanson: Yes, sir.

The Court: Can you file briefs in 10 days?

Mr. Johnson: Yes, sir. I would like, however, to now ask your Honor for permission to file an Amended Petition.

The Court: Let's get the briefs out of the way. Can you file one in 10 days?

Mr. Johnson: Yes, sir.

The Court: That will make it the 25th. Can you reply to it in 10 days?

Mr. Hanson: Yes, sir.

The Court: Let me have it before this case comes on, and all we will have to do then is to have the argument on that day. Now, we will take up the amendment.

Mr. Johnson: The complaint, your Honor, seeks a recovery for money paid on the ground that the tax law is [fol. 19] unconstitutional. It came into effect April 25th, 1941, or approximately four months after the year in which the company began to do business.

The Court: You want to amend so you can recover for that year?

Mr. Johnson: Two per cent for four months.

The Court: Is there any dispute about that?

Mr. Hanson: Only as to the law, your Honor.

The Court: It is agreed as to the date when the Act became effective, and that they had paid up to that time. Is the Act retroactive?

Mr. Hanson: It is our view that it is.

The Court: That is another question to brief.

Mr. Hanson: Yes, sir.

The Court: What is next?

Mr. Johnson: That is all.

The Court: You may file a Supplement to be regarded as a part of your Petition setting that up, as short and as concise as possible, and it will be considered filed as of today and the Answer of the Insurance Commissioner will be considered as filed as of today again in answer to that.

Mr. Hanson: It would be necessary for me to amend my answer.

The Court: I will give him until tomorrow to make his amendment, and give you five days thereafter to file a supplement of the same nature. Just answer that part of it.

The Court: The Reporter is allowed \$1.00 for reporting and \$5.50 for transcripts, including a copy to each side, or a total of \$6.50, and each side will pay him half thereof, or \$3.25. The court requests that you file your stipulation in 10 days.

Endorsed: Filed in District Court on September 21, 1942.

[fol. 20] IN UNITED STATES DISTRICT COURT

SUPPLEMENT TO COMPLAINT—Filed Sept. 16, 1942

House Bill 353 is not an entrance fee nor a regulatory measure enacted by virtue of the police power of Oklahoma.

but, as a revenue-producing measure enacted to provide funds for the operation of state government, it is a tax on the business of plaintiff, collected on and for the business done during the preceding year.

Between January 1, 1941, and the effective date of said Act, at which time the gross premium tax was raised from 2% to 4%, plaintiff collected gross premiums of Sixty-five Thousand Five Hundred Sixteen and 58/100 (\$65,516.58) Dollars, upon which defendant collected the full 4%, thus giving said Act a retrospective application.

If the court should rule that House Bill 353 is constitutional, defendant has illegally, unconstitutionally and retrospectively applied said Act, and has, without due process of law collected from the plaintiff One Thousand Three Hundred Ten and 34/100 (\$1,310.34) Dollars, which sum is the excessive 2% on premiums collected from January 1, 1941 to April 24, 1941, and plaintiff is entitled to judgment for the said One Thousand Three Hundred Ten and 34/100 (\$1,310.34) Dollars.

Wherefore, if House Bill 353 be held not to deny plaintiff the equal protection of the laws, plaintiff prays judgment for One Thousand Three Hundred Ten and 34/100 (\$1,310.34) Dollars by reason of the application of said Act.

Henry S. Griffing, John A. Johnson, Attorneys for Plaintiff, 2701 First National Building, Oklahoma City, Oklahoma.

Service of the above has been made by mailing a copy [fol. 21] thereof to Fred Hansen, Assistant Attorney General, attorney for the defendant.

Dated this 16th day of September, 1942.

John A. Johnson.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER TO SUPPLEMENT TO COMPLAINT.—Filed Sept. 18, 1942

Comes Now the above defendant and in answer to the "Supplement to Complaint" filed herein, alleges and states:

(1) Defendant denies all material allegations of fact set forth in said supplement, except such allegations as are hereinafter specifically alleged or admitted.

(2) Defendant denies all material allegations of fact set forth in the first paragraph of said supplement, and alleges that House Bill No. 353, referred to therein (Chapter 1a, Title 36, Oklahoma Session Laws 1941), effective April 25, 1941, is a part of the laws of the State of Oklahoma regulating foreign insurance companies doing business in Oklahoma; that same was enacted under and by virtue of the police powers of said State, and that the premium tax mentioned therein is a fee or tax charged foreign insurance companies desiring to enter Oklahoma and to do business therein for any license year for the right or privilege of entering Oklahoma and doing business therein during said year.

(3) Defendant admits the material allegations of fact set forth in the second paragraph of said supplement, but denies the legal conclusion contained therein.

(4) Defendant admits the material allegations of fact set forth in the third paragraph of said supplement which, in effect, state that a 2% tax on the \$65,516.58 of premiums collected by plaintiff in Oklahoma between January 1, 1941 and April 25, 1941, is \$1,310.34, but denies that defendant has illegally or without due process of law collected said \$1,310.34.

Wherefore, premises considered, defendant respectfully asks the court to deny plaintiff the relief prayed for in its [fol. 22] "Supplement to Complaint," and to render judgment in favor of defendant and against plaintiff, and for all costs of this suit.

Mac Q. Williamson, Attorney General, Fred Hansen,
Assistant Attorney General, Andy Crosby, Jr.,
Attorneys for Defendant.

Service of the above "Answer to Supplement to Complaint" has been made by mailing a copy thereof to Henry S. Griffing and John A. Johnson, Attorneys, 2701 First National Building, Oklahoma City, Oklahoma.

Dated this 17 day of September, 1942.

Fred Hansen, Assistant Attorney General.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS.—Filed Sept. 30, 1942

It is stipulated and agreed by and between the parties hereto, as follows:

- (1) That the sum of \$8,189.32, paid by plaintiff to defendant under protest, has been held by defendant separate and apart from the General Revenue Fund of the State Treasury of Oklahoma, as provided in Section 12665, O. S. 1931, and that said sum will not be deposited in said fund unless and until there is a final adjudication in favor of defendant and against plaintiff, but that if plaintiff obtains a final adjudication in its favor, the amount found by the court to be due plaintiff will be paid to it, as provided in said section.
- (2) That domestic life, health and accident insurance companies competing in Oklahoma with plaintiff do not pay any kind or type of taxes to said State which are not likewise paid by plaintiff, except that said competing domestic insurance companies pay an annual income tax, from which tax plaintiff is exempt, the amount of which tax, however, is approximately only 1/20th of the amount of four per [fol. 23] cent tax would bring on the premiums collected by said companies in this State, less proper deductions.
- (3) That during the period beginning November 16, 1907, and ending December 31, 1941, the total receipt of the Oklahoma Insurance Department from the two per cent tax on gross premiums of foreign insurance companies, and from the annual entrance and agents' fees of such companies, aggregate \$25,585,107.34, while the expenses of said department during said period aggregate \$910,107.34, said expenses being approximately 3.55% of said total receipts, and that since December 31, 1941, said expenses are approximately only 2% of the gross receipts thereof.
- (4) That under the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company desires for the first time to do business in Oklahoma, it is required, among other things, to file an application for a license therefore, same to expire the succeeding last day of February (see true and correct copy of such an application attached hereto as "Exhibit

A''), and on or before said date, to pay a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it receives in Oklahoma after it is so licensed and prior to the succeeding first day of January; and that under the uniform administrative interpretation by said Commissioner of the insurance laws of Oklahoma since said effective date, he has considered and treated said tax as being paid for the right or privilege of entering Oklahoma and doing business therein to and including said last day of February, and a license issued by him to said company (see true and correct copy of such a license attached hereto as Exhibit "B") as expiring by operation of law and its express terms on said date. It is understood that plaintiff does not agree to the correctness of the above administrative interpretation.

(5) That under the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a [fol. 24] foreign insurance company holding a license to do business in Oklahoma during any license year (same being from March 1 to and including the succeeding last day of February), desires to do business therein during the ensuing license year, it is required, among other things, (a) to file, on or before the last day of February of the current license year, an application for a license therefor (see true and correct copy of such an application attached hereto as "Exhibit A"), (b) as a condition precedent, to have paid a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, and (c) on or before the last day of February of said succeeding license year, to pay a similar tax on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year; and that under the uniform administrative interpretation of said Commissioner of the insurance laws of Oklahoma since said effective date, he has considered and treated the tax first above mentioned as having been paid for the right or privilege of having been permitted to enter Oklahoma and do business therein during the then current license year, the tax last above mentioned as being paid for the right or privilege of having been permitted to enter Oklahoma, do business therein during said ensuing license year, and a license issued by him to

said company (see true and correct copy of such a license attached hereto as "Exhibit B"), as expiring by operation of law and its express terms at the end of said license year. It is understood that plaintiff does not agree to the correctness of the above administrative interpretation.

(6) That under the uniform administrative practice of the State Insurance Commissioner since April 25, 1941, the effective date of Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, the annual four per cent tax on premiums, referred to in said section, has been levied and collected on all premiums received by licensed foreign insurance companies in this State, less proper deductions, "within the twelve months next preceding the first day of January," 1942, as well as on all premiums, less proper deductions, received by said companies in this state after [fol. 25] said date. It is understood that plaintiff does not agree to the correctness of the above administrative practice.

In Witness Whereof the above parties have hereunto set their hands and seals on this the 25th day of September, 1942.

Great Northern Life Insurance Company, by Henry S. Griffing, John A. Johnson, Attorneys for Plaintiff; Jess G. Read, by Mac Q. Williamson, Attorney General, Fred Hansen, Assistant Att'y General, Andy Crosby, Jr., Attorneys for Defendant.

EXHIBIT "A" TO STIPULATION OF FACTS

Agreement and Application for License

The John Doe Life Insurance Company of New York City, in the State of New York, hereby applies for License in the State of Oklahoma for the year _____ and agrees, under the signature of its President and Secretary, hereto attached, and the corporate seal of the said Company, that after receiving authority so to do from the Insurance Department of the State of Oklahoma, it will transact the business of Life Insurance only, in the State of Oklahoma, in accordance with the provisions of the laws of said State, and will pay all such Taxes and Fees as may at any time be

imposed by law or act of the legislature, upon Insurance Companies engaged in the business herein enumerated.

In Witness Whereof, We have hereunto subscribed our names and affixed the corporate seal of the Company, this 28th day of February, 1942.

Joe Doe, President, Richard Doe, Secretary. (Seal.)

[fol. 26] EXHIBIT "B" TO STIPULATION OF FACTS

(Insurance Department, State of Oklahoma)

License No. 1270, State of Oklahoma, Insurance Department

Whereas, the John Doe Life Insurance Company, a corporation, organized under the laws of the State of New York, and located at New York City, having complied with such of the requirements of the Insurance laws of Oklahoma, as are applicable to the said corporation, in order to enable it to transact business herein, now, therefore,

I, Jess G. Read, Insurance Commissioner, do hereby license and authorize the said John Doe Life Insurance Company subject to all requirements and conditions of the laws, to transact the business, of Life Insurance, in the State of Oklahoma, from March 1, 1942, to the last day of February, 1943.

In Witness Whereof, I have hereunto set my hand and caused the seal of my office to be affixed at the City of Oklahoma, in the State of Oklahoma, this first day of March, A. D. 1942.

Jess G. Read, Insurance Commissioner. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT—Filed October 14, 1942

The court makes the following findings of fact:

- (1) That the plaintiff, "Great Northern Life Insurance Company, a corporation," is a foreign insurance corporation, organized, existing and doing a life insurance business

under the laws of the State of Wisconsin, and is duly licensed and admitted to transact a life, health and disability insurance business in the State of Oklahoma during the license year beginning March 1, 1942 and ending February 28, 1943, and has been so licensed and admitted each and every license year since December 5, 1922; that the Jess G. Reed, referred to in the defendant "Jess G. Read, as Insurance Commissioner of the State of Oklahoma," is the duly elected, qualified and acting Insurance Commissioner of the State of Oklahoma, and has been such Commissioner since January 17, 1924.

(2) That plaintiff, at all times hereinafter mentioned, had the personnel and contracts of insurance and conducted and owned the business and property set forth in paragraph 3 of its "Complaint."

(3) That plaintiff, on February 28, 1942, acting under and pursuant to the provisions of Section 12665, Oklahoma Statutes 1931, relating to the payment under protest of taxes claimed by taxpayers to be illegal, paid under protest to defendant the sum of \$8,198.31, as a 4% tax upon all premiums, less proper deductions (to-wit: on premiums aggregating \$204,957.75), collected by plaintiff in Oklahoma during the calendar year beginning January 1, 1941 and ending December 31, 1941, as provided in Section 1 and the third paragraph of Section 2, Article 19 of the Constitution of Oklahoma, and Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941 (36 O. S. 1941 § 104), and at the same time paid defendant the entrance and agents fees referred to in the first and second paragraphs of Section 2 of said Article 19, and in Section 1, Chapter 1a, Title 36, supra.

(4) That prior to April 25, 1941, the effective date of said Chapter 1a, Title 36, the laws of Oklahoma required the payment of a 2% tax on the premiums, less proper deduction's, collected by foreign insurance companies in said state, which tax was raised to 4% by said section; that of said \$204,957.75 of premiums collected in Oklahoma by plaintiff during the calendar year of 1941, \$65,516.68 was collected during the period beginning January 1, 1941 and ending April 24, 1941, the 4% premium tax thereon being \$2,620.66 (one-half of said sum or \$1,310.34 is sued for in plaintiff's "Supplement to Complaint"), while the remain-

der of said premiumis, to-wit: \$139,441.17, was collected during the period beginning April 25, 1941 and ending December 31, 1941, the 4% premium tax thereon being \$5,577.64.

(5) That, as stated in paragraph 1 of the Stipulation of Facts herein, said sum of \$8,189.32, paid by plaintiff to defendant under protest, as aforesaid, has been held by defendant [fol. 28] separate and apart from the General Revenue Fund of the State Treasury of Oklahoma, as provided in Section 12665, Oklahoma Statutes 1931 (to-wit: as provided in Sections 5418 and 5419, Oklahoma Statutes 1931, same being 62 O. S. 1941 §§ 74-75, in defendant's protest fund "or account in the State Treasury), and said sum will not be deposited in said General Revenue Fund unless and until there is a final adjudication in favor of defendant and against plaintiff, but if plaintiff obtains a final adjudication in its favor, the amount found by the court to be due plaintiff will be paid to it, as provided in said section.

(6) That, as stated in paragraph 2 of the Stipulation of Facts herein, domestic life, health and accident insurance companies competing in Oklahoma with plaintiff, do not pay any kind or type of taxes to said State which are not likewise paid by plaintiff, except that said competing domestic insurance companies pay an annual income tax, from which tax plaintiff is exempt, the amount of which tax, however, is approximately only 1/20th of the amount a 4% tax would bring on the premiums collected by said companies in this State, less proper deductions.

(7) That, as stated in paragraph 3 of the Stipulation of Facts herein, during the period beginning November 16, 1907, and ending December 31, 1941, the total receipts of the Oklahoma Insurance Department from the 2% tax on gross premiums of foreign insurance companies, and from the annual entrance and agents fees of such companies, aggregated \$25,585,107.34, while the expenses of said department during said period aggregated \$910,107.34, said expenses being approximately 3.55% of said total receipts, and since December 31, 1941, said expenses are approximately only 2% of the gross receipts thereof.

(8) That, as stated in paragraph 4 of the Stipulation of Facts herein, under the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a

foreign insurance company desires for the first time to do business in Oklahoma, it is required, among other things, to file an application for a license therefor, same to expire the succeeding last day of February (a true and correct copy of such an application is attached to said stipulation as "Exhibit A"), and, on or before said date, to pay a tax [fol. 29] of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it receives in Oklahoma after it is so licensed and prior to the succeeding first day of January; and under the uniform administrative interpretation by said Commissioner of the insurance laws of Oklahoma since said effective date, he has considered and treated said tax as being paid for the right or privilege of entering Oklahoma and doing business therein to and including said last day of February, and a license issued by him to said company (a true and correct copy of such a license is attached to said stipulation as "Exhibit B") as expiring by operation of law and its express terms on said date.

(9) That, as stated in paragraph 5 of the Stipulation of Facts herein, under the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company holding a license to do business in Oklahoma during any license year (same being from March 1 to and including the succeeding last day of February) desires to do business therein during the ensuing license year, it is required, among other things, (a) to file, on or before the last day of February of the current license year, an application for a license therefor (a true and correct copy of such an application is attached to said stipulation as "Exhibit A"), (b) as a condition precedent to have paid a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, and (c) on or before the last day of February of said succeeding license year, to pay a similar tax on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, and under the uniform administrative interpretation of said Commissioner of the insurance laws of Oklahoma since said effective date, he has

considered and treated the tax first above mentioned as having been paid for the right or privilege of having been permitted to enter Oklahoma and do business therein during the then current license year, the tax last above mentioned as being paid for the right or privilege of having been permitted to enter Oklahoma and do business therein during said ensuing license year, and a license issued by him to said company (a true and correct copy of such a license is attached to said stipulation as "Exhibit B") as expiring by operation of law and its express terms at the end of said license year.

(10) That, as stated in paragraph 6 of the Stipulation of Facts herein, under the uniform administrative practice of the State Insurance Commissioner since April 25, 1941, the effective date of Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, the annual 4% tax on premiums, referred to in said section, has been levied and collected on all premiums received by licensed foreign insurance companies in this State, less proper deductions, "within the twelve months next preceding the first day of January," 1942, as well as on all premiums, less proper deductions, received by said companies in this State after said date.

(14) That it is not alleged in the cause of action set forth in plaintiff's "Supplement to Complaint" that same arises under the Fourteenth Amendment of the Constitution of the United States or under any other provision of said Constitution, and said supplement shows that the amount in controversy therein is less than \$3,000.00, exclusive of interests and costs, being for only \$1,310.34.

Dated this 14th day of October, 1942.

Bower Broaddus, United States District Judge.

OK: John A. Johnson, Henry S. Griffing, Attorneys for Plaintiff; Mac Q. Williamson, Attorney General; Fred Hansen, Assistant Attorney General; Andy Crosby, Jr., Attorneys for defendant.

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

CONCLUSIONS OF LAW—Filed October 14, 1942

The court makes the following conclusions of law:

(1) That this is a suit of a civil nature between a citizen of the State of Wisconsin and, in effect if not in name, the State of Oklahoma; that while said state by the provisions of Section 12665, Oklahoma Statutes 1931, waived its immunity from being sued in its own courts to recover taxes paid under protest, it did not waive its immunity under the Eleventh Amendment of the Constitution of the United States from being so sued in Federal Courts, and hence this court does not have jurisdiction over the subject matter of this suit or of defendant.

(2) That even though the State of Oklahoma by the provisions of Section 12665, Oklahoma Statutes 1931, waived its immunity under the Eleventh Amendment of the Constitution of the United States from being sued in Federal Courts to recover taxes paid under protest (which the court denies), there is no diversity of citizenship between plaintiff and defendant, and while the matter in controversy in plaintiff's "Complaint" exceeds \$3,000.00, exclusive of interests and costs, it does not arise under the Constitution or laws of the United States, and hence this court does not have jurisdiction over the subject matter of the cause of action set forth in said "Complaint."

(3) That it is not alleged in the cause of action set forth in plaintiff's "Supplement to Complaint" that same arises under the Fourteenth Amendment of the Constitution of the United States or under any other provision of said Constitution, and said supplement shows that the amount in controversy therein is less than \$3,000.00, exclusive of interest and costs, being for only \$1,310.34, and hence this court does not have jurisdiction over the subject matter of the cause of action set forth in said "Supplement to Complaint."

(4) That even if this court has jurisdiction of this action (which the court denies), neither the "Complaint" or the "Supplement to Complaint" filed by plaintiff herein, nor the pleadings and/or evidence in this case, state or show, [fol. 32] respectively, for the reasons hereinafter set forth, a claim against defendant upon which relief can be granted.

(5) That neither Sections 1 or 2, Article 19 of the Constitution of Oklahoma, or Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941 (36 O. S. 1941 § 104), nor the construction or application thereof by the Insurance Commissioner of Oklahoma, referred to in plaintiff's "Complaint" and "Supplement to Complaint," violate the Fourteenth Amendment of the Constitution of the United States or any provision of said Constitution or of the Constitution of Oklahoma.

6. That when a foreign insurance companies desires, for the first time, to enter Oklahoma and to do business therein, it is required, among other things, to file an application for a license to enter Oklahoma and do business therein to and including the succeeding last day of February, and to pay, on or before said date, a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it receives in Oklahoma after it so enters the same and prior to the succeeding first day of January; that said tax is paid for the right or privilege of so entering Oklahoma and doing business therein to and including said last day of February, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms on said date.

(7) That when such a licensed company desires to enter Oklahoma and do business therein during the ensuing license year (March 1 to and including the succeeding last day of February,) it is required, among other things, to file an application on or before the last day of February of the current year for a license to enter Oklahoma and do business therein during said ensuing license year, and, as a condition precedent, to show payment of a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, which payment was made for the right or privilege of having been permitted to enter Oklahoma and to do business therein during [fol. 33] *the then current license year, and to pay on or before the last day of February of said ensuing license year, a similar tax on all premiums, less proper deductions, which it receives in Oklahoma during the preceding calendar year; that said tax is paid for the right or privilege of having been permitted to enter Oklahoma and to do busi-

ness therein during said ensuing license year, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms at the end of said year.

(8) That the fact the premium tax law involved here, both before and after it was amended on April 25, 1941, to increase from 2% to 4% the tax on premiums, less proper deductions, collected by foreign insurance companies in the State of Oklahoma:

(a) discriminated heavily (as shown in the 6th paragraph of the "Findings of Fact" herein) against foreign insurance companies in favor of competing domestic insurance companies, and

(b) resulted in the collection of premium taxes greatly exceeding (as shown by the 7th paragraph of the "Findings of Fact" herein) the expenses of operating the Oklahoma Insurance Department;

did and does not make said law, either before or after said amendment, unconstitutional or invalid under the Fourteenth Amendment of the Constitution of the United States or under any provision of said Constitution or of the State of Oklahoma, since said premium taxes were and are annually paid by foreign insurance companies for the right or privilege of entering Oklahoma and doing business therein during the year for which same are paid, and since the payment thereof is a condition precedent for the securing of a license to enter Oklahoma and do business therein during the ensuing license year, all as is more fully shown by paragraphs six and seven hereof.

(9) That the annual four per cent tax on premiums referred to in Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941 (36 O. S. 1941 § 104), is levied and should be collected, as provided in said section, on all premiums received by licensed foreign insurance companies in Oklahoma, less proper deductions, "within the twelve months next preceding the first day of January," 1942, and that this is true even though said Act did not go into effect until April 25, 1941.

(10) That on the facts found by the court, plaintiff is not entitled to the relief prayed for in either its "Com-

plaint" or "Supplement to Complaint," or to any part thereof.

Dated this 14th day of October, 1942.

Bower Broaddus, United States District Judge.

OK: John A. Johnson, Henry S. Griffing, Attorneys for Plaintiff; Mac Q. Williamson, Attorney General; Fred Hansen, Assistant Attorney General; Andy Crosby, Jr., Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

DECREE--Filed October 14, 1942

This cause came on to be heard at this term on October 14, 1942, and evidence was offered, and the case was argued by counsel; and thereupon, upon consideration thereof:

It Is Ordered, Adjudged and Decreed that judgment be rendered for defendant and against plaintiff, that defendant go hence without day, that defendant recover its costs [fol. 35] from plaintiff, and that plaintiff's "Complaint" and "Supplement to Complaint" be dismissed.

Dated this 14th day of October, 1942.

Bower Broaddus, United States District Judge.

OK: John A. Johnson, Henry S. Griffing, Attorneys for Plaintiff. Mac Q. Williamson, Attorney General; Fred Hansen, Assistant Attorney General; Andy Crosby, Jr., Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL--Filed Nov. 4, 1942

To: Mac Q. Williamson, Attorney General of the State of Oklahoma and Fred Hansen, Assistant Attorney General of the State of Oklahoma, State *Capitol* Building, Oklahoma City, Oklahoma, Attorneys for the Defendant, Jess G. Read, Insurance Commissioner of the State of Oklahoma.

Notice is hereby given that Great Northern Life Insurance Company, the above named plaintiff, hereby appeals

to the Circuit Court of Appeals for the Tenth Circuit from the final Judgment and Decree, in its entirety, entered in this action on the 14th day of October, 1942.

Henry S. Griffing, Attorney for Appellant, Great Northern Life Insurance Company, a corporation.
John A. Johnson, Attorney for Appellant, Great Northern Life Insurance Company, a corporation.
Address: 2701 First National Bldg., Oklahoma City, Okla.

[fol. 36] A copy of the above Notice was mailed to Mac Q. Williamson, Attorney General of the State of Oklahoma, and to Fred Hansen, Assistant Attorney General of the State of Oklahoma, State *Capitol* Building, Oklahoma City, Oklahoma, attorneys for the Defendant, Jess G. Read, Insurance Commissioner of the State of Oklahoma, on the 4th day of November, 1942.

Grace B. Davis, Deputy Clerk of the United States District Court for the Western District of Oklahoma.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTE RE APPEAL BOND

[An appeal bond in the sum of \$250.00, with appellant as principal and National Surety Corporation as surety, was filed November 4, 1942.]

IN UNITED STATES DISTRICT COURT.

DESIGNATION OF THE ENTIRE RECORD AND PROCEEDINGS FOR INCLUSION IN THE RECORD ON APPEAL—Filed November 5, 1942

Great Northern Life Insurance Company, the appellant, through its attorneys of record, hereby designates the entire record and proceedings herein for inclusion in the record on appeal including the following:

1. The Complaint, including exhibit.
2. The Summons and Return.

3. Answer of Defendant.
 4. Transcript of proceedings at Pre-Trial Hearing.
 5. Supplement to Complaint.
 6. Answer to Supplement to Complaint.
 7. Stipulation of Facts, including exhibits.
 8. Findings of Fact by the Court.
 9. Conclusions of Law by the Court.
 10. Direction for Entry of Judgment.
- [fol. 37] 11. Decree of the Court.
12. Notice of Appeal.
 13. Cost Bond.
 14. Designation of entire record and proceedings for inclusion in the record on appeal.

Dated this 5th day of November, 1942.

Great Northern Life Insurance Co., by Henry S.
Griffing, John A. Johnson, Its Attorneys.

Jess G. Read, defendant and appellee herein, through his attorneys of record, acknowledges receipt of a copy of the foregoing designation of the records to be included in the record on appeal this 5 day of November, 1942.

Mac Q. Williamson, Attorney General of the State of Oklahoma; Fred Hansen, Assistant Attorney General of the State of Oklahoma, Attorneys for Defendant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Proceedings of Oct. 14, 1942.

Now on this 14th day of October, 1942, the above matter comes on for hearing before Hon. Bower Broaddus, Judge.

APPEARANCES: Mr. John Allen Johnson for the plaintiff. Mr. Fred Hansen, Assistant Attorney General for the defendant.

COLLOQUY

Mr. Hansen: I desire to introduce in the record of this case a copy of a decision of the Honorable Lucius Babcock,

Judge of the District Court of Oklahoma County, Oklahoma, [fol. 38] dated September 8, 1942 in the case of Lincoln National Life Insurance Company versus Jess G. Read, Insurance Commissioner of Oklahoma, et al., No. 105488 in said court, said copy to be introduced for the sole purpose of identifying the same as being a true and correct copy of said decision and in order that same may be considered by this court and by any court to which this case may be appealed as the decision of the District Court of Oklahoma County, Oklahoma, in said case.

In this connection, it is stipulated by the parties hereto that the first and third causes of action of said case involved issues substantially the same, respectively, as those involved in plaintiff's complaint and supplement to complaint, and that said copy is a true and correct copy of said decision.

The Court: I take it that decision holds. Of course, it does not pass on the question of jurisdiction in this case because the state court would have jurisdiction, but it does hold I take it, from your introducing it, that the tax is a condition to the right to do business?

Mr. Hansen: Yes, sir, and it is for that reason I wanted to get this in the record here, so I could properly identify it and argue it as being an authority, and if the case is appealed it would be in the record, so there would be no question of its identity; so I would have the right to use it as an authority on any brief on appeal.

The Court: Under the ruling of the United States Supreme Court following the Erie Railroad Company case, while I don't think it is binding as to any Federal constitutional provision, but the mere fact they hold we are bound by the state court's decision, I would be required to take judicial notice of any decision, but it is quite proper to have it made a part of the record.

Mr. Johnson: I object to its introduction on several grounds, one of which is that this is a matter governed by the Federal constitution, and under the decision in the Erie Railroad case a decision of a state court would have no binding effect. Another objection is that the District Court of Oklahoma County, Oklahoma, is not a court whose decisions are printed and cited; whose decisions are not in a [fol. 39] form which may be readily obtainable, and the only opinion of the Supreme Court on the matter holds, or the

opinion refers to inferior courts whose decisions are printed and published.

The Court: That opinion was not based upon that. There is no recital of any kind supporting your contention, in that opinion. The Supreme Court of the United States held, I believe it was in an Ohio case, holding Ohio decisions would be controlling. They didn't say it was printed., I will permit it to be made part of the record.

Mr. Johnson: I would add one more thing, if it is to be made a part of the record and considered. Your Honor has practiced in the courts of Oklahoma for many years, and therefore well knows that orders and judgments of district courts in the State of Oklahoma are not prepared by the district judges but are prepared by the attorneys and signed by the courts. This decision being introduced was prepared by Mr. Hansen, for whatever effect that may have upon the ruling of the court.

The Court: I know this: in any court the judge requires quite often that the attorneys prepare orders and findings of fact. I do in this court, but I examine them and quite often change them, but when I sign them they are mine. It may be admitted. Is that all the record you care to make?

Mr. Hansen: Yes, sir.

The Court: Do you care to make any additional record?

Mr. Johnson: No, your honor.

Endorsed: Filed in District Court on Dec. 3, 1942.

DEFENDANT'S EXHIBIT "A"

In the District Court of the State of Oklahoma, in and for Oklahoma County. The Lincoln National Life Insurance Company, a corporation, Plaintiff, vs. Jess G. Read, The Insurance Commissioner of the State of Oklahoma; and Carl B. Sebring, State Treasurer of the State of Oklahoma, Defendants. No. 105,488

[fol. 40]

Journal Entry

Now on this the 8th day of September, 1942, the above cause came on for hearing upon defendants' demurrer to the second amended petition of plaintiff, both parties being present by their respective attorneys of record; and the

Court having examined the pleadings and having heard the argument of counsel, asked both parties to file briefs, and took the case under advisement.

Now on this 11th day of September, 1942, said briefs having been filed and considered, this cause *same* on for decision upon said demurrer, the parties appearing, as aforesaid, and the court being fully advised in the premises, and in consideration thereof, finds that neither Section 2, Article 19 of the Constitution of Oklahoma, Section 10478, Oklahoma Statutes 1931, or House Bill No. 353 of the 18th Oklahoma Legislature (Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941), nor the construction or application thereof by the Insurance Commissioner of Oklahoma referred to in plaintiff's second amended petition, violate the 14th Amendment of the Constitution of the United States or the Constitution of Oklahoma, and that neither said petition nor the 1st, 2nd or 3rd causes of action thereof state facts sufficient to constitute a cause of action in favor of plaintiff and against defendants, or either of them, and that hence defendants' demurrer to said petition and to each of its said causes of action should be sustained.

The court further finds, in relation to said first cause of action, that under the pertinent constitutional and statutory provisions of this State, as construed in the case of New York Life Insurance Company v. Board of Commissioners of Oklahoma County, 155 Okla. 247, 9 Pac. (2d) 636, and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, said administrative practice being a matter of common knowledge of which the Court will take judicial notice:

(a) When a foreign insurance company desires, for the first time, to enter Oklahoma and to do business therein, [fol. 41] it is required, among other things, to file an application for a license to enter Oklahoma and do business therein to and including the succeeding last day of February, and to pay, on or before said date, a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it receives in Oklahoma after it so enters the same and prior to the succeeding first day of January; that said tax is paid for the right or privilege of so entering Oklahoma and doing business therein to and including said last day of February, and

that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms on said date, and

(b) when such a licensed company desires to enter Oklahoma and do business therein during the ensuing license year (March 1 to and including the succeeding last day of February), it is required, among other things, to file on or before the last day of February of the current license year, an application for a license to enter Oklahoma and do business therein during said ensuing license year, and, as a condition precedent, to show payment of a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, which payment was made for the privilege of having been permitted to enter Oklahoma and to do business therein during the then current license year, and to pay on or before the last day of February of said ensuing license year, a similar tax on all premiums, less proper deductions, which it receives in Oklahoma during the preceding calendar year; that said tax is paid for the right or privilege of having been permitted to enter Oklahoma and to do business therein during said ensuing license year, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms at the end of said year.

The court also finds, in relation to said second cause of action, that under the pertinent constitutional and statutory provisions of this state and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, [fol. 42] said administrative practice being a matter of common knowledge of which the court will take judicial notice, the words "after all cancellations are deducted" as used in Section 2, Article 19 of the Constitution of Oklahoma, and the words "after all cancellations and dividends to policyholders are deducted" as used in Section 10478, Oklahoma Statutes 1931, and Section 1, Chapter 1a Title 36, page 121, Oklahoma Session Laws 1941, do not refer to or include cash surrender values paid by licensed foreign life insurance companies in this State to their Oklahoma policyholders.

The court further finds, in relation to said third cause, of action, that under the express provisions of Section 1,

Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, and the uniform administrative practice of the State Insurance Commission since April 25, 1941, the effective date of said Act, said administrative practice being a matter of common knowledge of which the court will take judicial notice, the annual four per cent *tac* on premiums referred to in said section is levied and should be collected on all premiums received by licensed foreign insurance companies in this State, less proper deductions, "within the twelve months next preceding the first day of January," 1942, as well as on all premiums, less proper deductions, received by said companies after said date.

It Is Therefore Ordered, Adjudged and Decreed by the Court that defendants' demurrer to plaintiff's second amended petition in the above cause be and the same is hereby sustained, to which findings and order plaintiff excepted, which exceptions are duly allowed. Thereupon plaintiff announced in open court its intention to stand upon its said petition and to refuse to plead further.

It Is Therefore Ordered, Adjudged and Decreed by the Court that the above case be dismissed at the cost of plaintiff, to which ruling and judgment of the court plaintiff excepted, and its exceptions are duly allowed.

Thereupon, in open court, plaintiff gave notice of its intention to appeal to the Supreme Court of the State of Oklahoma, and upon application of plaintiff and for good cause shown, it is ordered and adjudged by the court that plaintiff [fol. 43] be granted 30 days' time in addition to the time allowed by law to make and serve case-made appeal to the Supreme Court of Oklahoma in said cause, defendants to have three (3) days thereafter in which to suggest amendments, the case-made to be signed and settled upon three (3) days' notice by either party.

Lucius Babcock, District Judge.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 44] IN UNITED STATES CIRCUIT COURT OF APPEALS,
TENTH CIRCUIT

ORDER OF SUBMISSION—March 17, 1943

Third Day, March Term, Wednesday, March 17th, A. D. 1943. Before Honorable Orie L. Phillips, Honorable Sam

G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

This cause came on to be heard and was argued by counsel, John A. Johnson, Esquire, appearing for appellant, Fred Hansen, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—May 7, 1943.

John A. Johnson (Henry S. Griffing was with him on the brief) for appellant.

Fred Hansen, Asst. Atty. Gen. of Oklahoma (Mac Q. Williamson, Atty. Gen. of Oklahoma, was with him on the brief) for appellee.

Before Phillips, Bratton, and Huxman, Circuit Judges

PHILLIPS, Circuit Judge, delivered the opinion of the court:

Great Northern Life Insurance Company is a corporation organized under the laws of Wisconsin. It is authorized to issue policies of life, health, and disability insurance. In December, 1922, the Insurance Commissioner of Oklahoma issued to it a certificate of authority to transact business in Oklahoma and regularly thereafter issued like certificates to it for the years 1923 to 1942, inclusive. Each of such certificates by its terms expired on the last day of February next after its issue.

Sec. 1 of Art. XIX of the Oklahoma Constitution provides that no foreign insurance company shall be granted a license or be permitted to do business in Oklahoma "until it shall have complied with the laws of" Oklahoma and "shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insur-[fol. 45] ance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license."

Sec. 2 of Art. XIX of the Oklahoma Constitution provides that until otherwise provided by law, each foreign life insurance company doing business in Oklahoma shall pay to the Insurance Commissioner an entrance fee of \$200 per annum; and until otherwise provided by law, an annual tax of two per cent on all premiums collected in the state, and a tax of \$3 on each local agent.

Ch. 21, Art. I, §22, O. S. L., 1909, §10478, O. S. 1931, provided that every foreign insurance company doing business in Oklahoma should, on or before the last day of February in each year, report to the Insurance Commissioner the total amount of gross premiums received by it in the state during the preceding year and pay to the Insurance Commissioner an entrance fee as provided in Art. XIX of the Oklahoma Constitution, an annual tax of two per cent on all premiums collected in the state, and an annual tax of \$3 on each local agent, and that any company "failing to make such returns and payments promptly and correctly" should forfeit and pay to the Insurance Commissioner, in addition to the amount of such taxes, the sum of \$500, and that any company so failing for sixty days should thereafter be debarred from transacting any business in the state until such taxes and penalties had been fully paid. Sec. 10478, supra, was amended by §1, Ch. 1a, Tit. 36, p. 121, O. S. L., 1941, (36 O. S. 1941, §104). The amended Act became effective April 25, 1941. It increased the annual gross premiums tax from two per cent to four per cent.

Ch. 21, Art. I, §21, O. S. L., 1909, 36 O. S. 1941, §56, provides that the Insurance Commissioner, in December of each year, shall furnish to each insurance company authorized to do business in Oklahoma, two or more blanks in form adapted for its annual statement, and that each of such insurance companies shall annually, on or before the last day of February, file in the office of the Insurance Commissioner a statement which shall exhibit its financial condition on the thirty-first day of December of the previous year and its business of that year; and that if the Insurance Commissioner finds that all laws applicable to a company have been fully complied with, and the facts warrant, he [fol. 46] shall issue to such company a license or certificate of authority, subject to all requirements and conditions of law, to transact business in the state, and that such certificate shall expire on the last day of February next after its issue.

It has been the uniform administrative practice of the Insurance Commissioner, since the effective date of the 1909 General Insurance Act of Oklahoma,¹ when a foreign insurance company desires for the first time to do business in Oklahoma, to require it, among other things, to file an appli-

¹ Ch. 21, O. S. L., 1909.

cation for a license to expire on the last day of February next after its issue, and, on or before such date, to pay the gross premiums tax imposed by law on all premiums, less proper deductions, received by it in Oklahoma from the date of issue of its license to and including the thirty-first day of December next; and when a foreign insurance company holding a license to do business in Oklahoma during any license year desires to do business therein during the ensuing license year, to require it, among other things, (a) to file, on or before the last day of February of the current license year, an application for a license for the ensuing year, (b) to pay the gross premiums tax on all premiums, less proper deductions, received by it in Oklahoma during the preceding calendar year, as a condition precedent to the issuance of the license for the ensuing year, and (c) to pay, on or before the last day of February of the ensuing license year, the gross premiums tax on all premiums, less proper deductions, received by it in Oklahoma during the preceding calendar year; and since the effective day of such Act the Insurance Commissioner has uniformly interpreted such Act as providing for a license to expire on the last day of February next after its issue; and in issuing renewal licenses has uniformly construed it as requiring the payment, on or before the last day of February in each year, of the gross premiums tax for the right or privilege of entering Oklahoma and doing business therein during the license year expiring on that date.

Licenses issued to foreign insurance companies, by their express terms, expire on the last day of February next after their issue.

[fol. 47] No gross premiums tax is exacted from domestic insurance companies in Oklahoma.

On February 28, 1942, the Insurance Company paid under protest the gross premiums tax required by 36 O. S. 1941, §104, being four per cent of the gross premiums collected by it, less proper deductions, for the calendar year ending December 31, 1941. It brought this action to recover such tax. From an adverse judgment, the Insurance Company has appealed.

It is a well-settled rule that a state, subject to the paramount authority of the Federal Constitution,² may withhold

² Noble v. Mitchell, 164 U. S. 367, 370, 371;

Hooper v. California, 155 U. S. 648, 655, 656;

Power Mfg. Co. v. Saunders, 274 U. S. 490, 496, 497.

from a foreign corporation the privilege of doing business within its boundaries, or may grant such privilege on such conditions as it deems fit.³ The general rule is subject to the well-settled qualification that a state may not impose conditions which require the surrender of rights guaranteed by the Federal Constitution.⁴

The power of a state to exact a gross premiums tax from a foreign insurance company for the privilege of doing business in a state is well settled.⁵

[fol. 48] It is not an essential of a privilege tax that it be paid before the exercise of the privilege. Payment may precede or follow the exercise of the privilege, depending on which system the legislature chooses to adopt.⁶

³ Williams v. Standard Oil Co. of La., 278 U. S. 235, 240; Hanover Fire Ins Co. v. Harding, 272 U. S. 494, 507; Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 10 Cir., 100 F. 2d 770, 774; 20 C. J. S., §1810, p. 30; Id., §1811, p. 32; Note, 49 A. L. R., p. 727.

⁴ Williams v. Standard Oil Co. of La., 278 U. S. 235, 241; Terral v. Burke Construction Co., 257 U. S. 529, 532; Hanover Fire Insurance Co. v. Harding, 272 U. S. 494, 507; Washington v. Superior Court of Washington, 289 U. S. 361, 365.

⁵ Philadelphia Fire Association v. New York, 419 U. S. 110, 119; Pittsburgh Life & Trust Co. v. Young, 172 N. C. 470, 90 S. E. 568, 570, 571; Massachusetts Bonding & Ins. Co. v. Chorn, 274 Mo. 15, 201 S. W. 1122, 1123-1125; Equitable Life Assur. Soc. of United States v. Pennsylvania, 238 U. S. 143; Commonwealth v. Equitable Life Assur. Soc. of United States, 239 Pa. 288, 86 A. 787;

⁶ State v. Continental Assur. Co., 176 Tenn. 1, 137 S. W. 2d 277;

Continental Assur. Co. v. Tennessee, 311 U. S. 5.

⁶ Carpenter v. Peoples Mutual Life Ins. Co., — Cal. —, 74 P. 2d 508, 510;

William A. Slater Mills v. Gilpatrick, 97 Conn. 521, 117 A. 806, 808.

In the case of **New York Life Ins. Co. v. Board of County Commissioners of Oklahoma County**, 155 Okl. 249, 9 P. 2d 936, 938, 939, 944, the Supreme Court of Oklahoma held that the gross premiums tax was not a tax in a constitutional sense, but was a license fee or privilege tax for the privilege of doing business in the state.

It is clear, under the Oklahoma statutes, that the license of a foreign insurance company expires on the last day of February next after its issue. Art. XIX of the Oklahoma Constitution and the Oklahoma statutes, hereinabove referred to, permit of the construction that the payment of the gross premiums tax on or before the expiration of the license year on the last day of February is exacted for the privilege of doing business in the state during that license year and as a condition precedent to the issuance of a license for the ensuing year. Such has been the uniform and long-continued construction of the executive department charged with the administration of the statutes. The long-continued construction of a statute by a department of the government charged with its execution is entitled to great weight and should not be overturned without cogent reasons.⁷ The Legislature of Oklahoma has convened many times during this period of administrative construction without expressing its disapproval. That silence may be regarded as acquiescence in or approval of the administrative construction.⁸ Similar statutory provisions have been so construed.⁹

[fol. 49] The Insurance Company's license which was issued in 1940 expired February 28, 1941. March 1, 1941, to

⁷ **Globe Indemnity Co. v. Bruee**, 10 Cir., 81 F. 2d 143, 152, certiorari denied 297 U. S. 716;

City of Tulsa v. Southwestern Bell Tele. Co., 10 Cir., 75 F. 2d 343, 349, certiorari denied 295 U. S. 744;

United States v. Jackson, 280 U. S. 183, 193;

Federal Land Bank v. Warner, 292 U. S. 53, 55.

Skelton v. United States, 10 Cir., 88 F. 2d 599, 604; **Commissioner v. McKinney**, 10 Cir., 87 F. 2d 811, 815; **United States v. Midwest Oil Co.**, 236 U. S. 459, 474;

Morrissey v. Commissioner, 296 U. S. 344, 355.

⁸ **Pacific Mutual-Life Ins. Co. v. Hobbs**, 152 Kan. 230, 103 P. 2d 854, 856, 857;

Sovereign Camp, W.O.W. v. Casados, D.C.N.M., 21 F. Supp. 989.

February 28, 1942, constituted a new license year and a new admission into the state. It was within the power of the state to change the conditions of admission at any time as to future license years and the Insurance Company was not entitled to a license for a license year beginning after the effective date of the amendment increasing the gross premiums tax, without paying such increased tax for that year.¹⁰

Hanover Fire Insurance Co. v. Harding, 272 U. S. 494, strongly relied on by counsel for the Insurance Company, is distinguishable from the instant case. In that case the Hanover Company conducted the business of fire insurance in the town of South Chicago, Cook County, Illinois, through agencies which it there maintained. A statute of the state of Illinois, adopted June 28, 1919 (Cahill's Ill. Rev. Stat. 1925, c. 73, §79, p. 1390), provided that each nonresident corporation licensed and permitted to do an insurance business in Illinois should pay an annual state tax for the privilege of so doing, equal to two per cent of the gross amount of the premiums received during the preceding calendar year on contracts covering risks within Illinois. The Hanover Company regularly procured a license from the Department of Trade and Commerce in Illinois and annually paid the two per cent gross premiums tax.

Sec. 30 of the Fire and Marine Insurance Act of 1869, as amended, (Cahill's Ill. Rev. Stat. 1925, c. 73, §159, p. 1405) in part reads:

"Every agent of any insurance company, incorporated by the authority of any other State or government, shall return to the proper officer of the county, [fol. 50] town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding

¹⁰ *Philadelphia Fire Association v. New York*, 119 U. S. 110, 119;

Manchester Fire Ins. Co. v. Herriott, C. C. Ia., 91 F. 711, 717-720;

British-American Mortg. Co. v. Jones, 77 S. C. 443, 58 S. E. 417, 420;

Note, 49 A. L. R., p. 751.

The question of the validity of the increase in the tax on gross premiums received between January 1, 1941, and April 25, 1941, is not raised and we express no opinion with respect thereto.

year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes— . . . that other personal property is subject to at the place where located, . . . ”

The General Revenue Act of Illinois, adopted in 1898 (Cahill's Rev. Stat. 1925, c. 120, §329, p. 2042), required personal property to be valued at its fair cash value and set down in one column headed “Full Value,” and one-half thereof to be ascertained and set down in another column headed “Assessed Value.” For the year 1923, and for many years prior thereto, by what was called an equalization, systematically and intentionally carried out, the amount set down in a column headed “Full Value” was not more than sixty per cent of the actual market value of the personal property returned, and the amount set down in the column headed “Assessed Value” was not more than thirty per cent of the market value. In a long line of decisions the Supreme Court of Illinois had held that the tax imposed by §30, supra, on the net receipts was a tax on personal property.¹¹ Accordingly, net receipts were treated as personal property and their assessment was by equalization and debasement reduced to thirty per cent of their full value. The Supreme Court of Illinois, in *People v. Barrett*, 309 Ill. 53, 139 N. E. 903, decided June 20, 1923, held that the tax under §30 was an occupation tax and that the value of net receipts should not be reduced as in the assessment of personal property. The Hanover Company brought an action against the county treasurer and ex-officio tax collector of Cook County, in the Superior Court of Cook County, in which it prayed for an injunction to prevent the distraint of its property under a warrant for the collection of taxes alleged to be due under §30. The Superior Court denied the relief sought and the Supreme Court of Illinois affirmed.

¹¹ *Walker v. Springfield*, 94 Ill. 364; *City of Chicago v. James*, 114 Ill. 479; *Chicago v. Phoenix Insurance Company*, 126 Ill. 276; *National Fire Insurance Company v. Hanberg*, 215 Ill. 378; *People v. Cosmopolitan Fire Insurance Co.*, 246 Ill. 442;

[fol. 51] See *Hanover Fire Insurance Co. v. Carr*, 317 Ill. 366. The case was taken by writ of error to the Supreme Court of the United States. That court held that the authority or license granted by the Department of Trade and Commerce under the Act of June 28, 1919, for which the Hanover Company paid two per cent of gross premiums received by it during the preceding year, put it upon a level with domestic insurance companies doing business of the same character; that compliance with §30 was not a condition precedent to permission to do business in Illinois and that the state Supreme Court had so conceded; that the tax imposed under §30 upon 100 per cent of the net receipts of foreign insurance companies admitted to do business in Illinois was a heavy discrimination in favor of domestic insurance companies of the same class and was a denial of the equal protection of the laws, and that the state could not exact as a condition of the Hanover Company's engaging in business in Illinois, that rights secured to it by the Federal Constitution might be infringed. See *Hanover Insurance Company v. Harding*, 272 U. S. 494. In that case, the state, having exacted a gross premiums tax for the privilege of doing business in the state, undertook to impose, in addition thereto, an unconstitutional tax.

In the instant case, the state exacts the payment on or before the twenty-eighth day of February in each year¹² of a valid privilege tax based on gross premiums for the privilege of doing business in Oklahoma during the license year expiring on that date and the payment of such valid tax as a condition precedent to the issuance of a license for the ensuing license year. The Supreme Court recognized in the *Hanover Insurance Company Case* that "at the end of the year for which the license has been granted, the State may in its discretion impose, as conditions precedent for a renewed license, past compliance with its valid laws."¹³

We accordingly conclude that 36 O. S. 1941, § 104, does not violate the Fourteenth Amendment.

The judgment is, therefore, Affirmed.

¹² In leap years the 29th day of February.

¹³ *Hanover Insurance Co. v. Harding*, 272 U. S. 494, 514.

[fols. 52-71] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—May 7, 1943

Twenty-sixth Day, March Term, Friday, May 7th, A. D. 1943. Before Honorable Orie L. Phillips, Circuit Judge, and Honorable J. Foster Symes, District Judge.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed; and that Jess G. Read, Insurance Commissioner for State of Oklahoma, appellee, have and recover of and from Great Northern Life Insurance Company, a corporation, appellant, his costs herein.

Petition for rehearing covering 17 pages omitted from this print.

It was denied, and nothing more by order of June 9, 1943.

[fols. 72-73] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—June 9, 1943

This cause came on to be heard on the application of appellant for leave to file a petition for rehearing herein out of time and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said application be and the same is hereby granted and that the appellant be permitted to file twenty printed copies of a petition for rehearing in this cause instanter, which is accordingly done.

It is further ordered by the court that the said petition be and the same is hereby denied.

IN UNITED STATES CIRCUIT COURT OF APPEALS

NOTE RE ISSUANCE OF MANDATE

On June 21, 1943, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and

judgment of said court, was issued to the United States District Court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 74] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1943.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. Counsel are requested to discuss in their briefs and on oral argument the right of petitioner to maintain its suit in a federal court.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Herbert R. Tews. File No. 47,728. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 235. Great Northern Life Insurance Company, Petitioner, vs. Jess G. Read, Insurance Commissioner for the State of Oklahoma. Petition for a writ of certiorari and exhibit thereto. Filed August 6, 1943. Term No. 235 O. T. 1943.

(8764)

FILE COPY

FILED

AUG 6 1943

CHARLES ELMER CROPLEY
CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1943

235

No. _____

GREAT NORTHERN LIFE INSURANCE COMPANY,

Petitioner,

vs.

JESS G. READ, Insurance Commissioner for
the State of Oklahoma,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
AND
BRIEF IN SUPPORT THEREOF**

GREAT NORTHERN LIFE INSURANCE COMPANY,

BY HENRY S. GRIFFING,

JOHN A. JOHNSON,

2701 First National Building,
Oklahoma City, Oklahoma;

✓ HERBERT R. TEWS,

11 So. LaSalle Street,
Chicago, Illinois,

Counsel for Petitioner.

August, 1943.

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In the
Supreme Court of the United States
OCTOBER TERM, 1943

No. _____

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

vs.

JESS G. READ, Insurance Commissioner for
the State of Oklahoma,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
TENTH CIRCUIT AND BRIEF IN
SUPPORT THEREOF**

*To the Honorable, the Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

This case challenges the validity under the equal protection clause of the Fourteenth Amendment to the Federal Constitution of the Oklahoma gross premiums tax law of 1941, and is the first test of the validity of this law.

The 1941 Act*, Section 1, Chapter Ia, Title 36, page 121, Oklahoma Session Laws 1941 (36 O. S. 1941, Sec. 104), levies an annual tax of 4% upon the gross premiums collected in Oklahoma during the preceding calendar year by foreign insurance companies doing business in that state. The act is amendatory of Section 10478, Oklahoma Statutes 1931, and is substantially identical with the previous enactment except that the annual tax is increased from 2% on all premiums (less statutory deductions) to 4%. The 1941 Act provides, in substance, that foreign insurance companies doing business in Oklahoma shall make an annual report, under oath, on or before the last day of February of the total amount of gross premiums received in the state during the twelve months next preceding the first of January, shall pay an "entrance fee" as provided by Article XIX of the Constitution of Oklahoma, also pay an annual tax of 4% on the premiums reported after deductions of cancellations and dividends to policy holders, and an annual tax of \$3.00 on each agent. Penal features of the act provide for a \$500.00 fine and after sixty days' failure to make such returns and payments, a barring from the transaction of any business in the state.

The constitutional provisions, found in Article XIX and referred to by the gross premiums tax law, provide in Section 1 that no foreign insurance company shall be permitted to do business in Oklahoma until after it has

* Printed as an appendix hereto.

complied with state laws, including collateral deposits, and agreed to pay all taxes and fees as might at any time be imposed by the Legislature; further, that a refusal to pay such taxes shall work a forfeiture of the license. The first paragraph of Section 2 provides that "until otherwise provided by law," all foreign insurance companies are required to pay to the insurance commissioner an "*entrance fee*" varying from \$25.00 per annum for a foreign livestock insurance company to \$200.00 for a foreign life insurance company. The second paragraph of Section 2 stipulates that "until otherwise provided by law, domestic companies excepted," foreign companies shall pay an "*annual tax*" of two per centum on all premiums collected in the state, and a tax of \$3.00 on each local agent.

Plaintiff is a Wisconsin corporation doing a life and health and accident insurance business (R. 13). It first entered Oklahoma, December 5, 1922, at which time the first gross premiums tax law imposing a tax of 2% pursuant to the provisions of the Oklahoma Constitution, had been in effect for thirteen years. On or before February 28, 1941, plaintiff obtained a renewal of its annual license and became authorized to conduct business in Oklahoma during the succeeding license year and until February 28, 1942. The 1941 gross premiums tax law became effective April 25, 1941, after only two months of the license period had passed and doubled the tax upon the premiums collected by foreign insurance companies during that entire current year. The foregoing

fact situation is set forth by the complaint (R. 4) and admitted by the answer (R. 12).

This suit originated on a complaint to recover from the defendant the gross premiums tax paid under protest on February 28, 1942, in order to obtain a license renewal for the license year commencing at that time, and to avoid the imposition of the penalties imposed by the taxing act.

The complaint alleges (R. 5) and the answer admits that plaintiff had obtained six thousand insurance contracts, employed and trained forty-five agents, and gathered valuable factual and medical information during its twenty years of business in Oklahoma prior to the effective date of the 1941 tax act. Pursuant to a stipulation of facts, the Judge of the United States District Court for the Western District of the State of Oklahoma found that domestic insurance companies pay no taxes in Oklahoma that are not likewise paid by plaintiff, except that domestic companies pay an annual income tax, the amount of which approximates one-twentieth of the amount said companies would pay if required to pay a 4% gross premiums tax (R. 28). Plaintiff thereby met its burden of proving the gross inequality of the taxing act. *Concordia Fire Ins. Co. v. People of the State of Illinois*, 292 U. S. 535, 78 L. ed. 1411, 54 S. Ct. 830. The court found that 3.55% of \$25,000,000.00 collected by the Oklahoma Insurance Department under the 2% taxing act had been expended for the cost of maintaining the department, and that under the 1941 act, the department expenses (and, therefore, the cost of regulat-

ing foreign insurance companies) was approximately 2% of those gross receipts.

It was also found that the Insurance Commissioner has uniformly considered the 2% gross premiums tax as being a payment for the privilege of entering Oklahoma and doing business during the calendar year preceding the tax payment, and has considered the annual license as expiring on the last day of February of each year (R. 28, 29, 30). The inference from the findings of fact is that the same interpretation was accorded the doubled tax during the ten months since its passage.

From an adverse judgment in the district court, an appeal was taken by petitioner to the Circuit Court of Appeals for the Tenth Circuit and the judgment was there affirmed on May 7, 1943 (R. 44-51). By its opinion the Circuit Court ruled:

- (1) That annual licenses issued to foreign insurance companies doing business in Oklahoma expire on the last day of February next after their issue (R. 48).
- (2) That the payment of the 4% gross premiums tax was for the privilege of having done business in the state during the then expiring license year and as a condition precedent to a license renewal for the ensuing year (R. 48).
- (3) That since this company was only admitted to do business in Oklahoma until February 28, 1942, the state had the constitutional power to double the tax burden during that

license year and to refuse to renew the license for the succeeding year unless the tax had previously been paid (R. 49).

(4) That the decision of this Court in *Hanover Fire Insurance Co. v. Harding*, 272 U. S. 494, 71 L. ed. 372, 47 S. Ct. 179, 49 A. L. R. 713, is distinguishable, and that there was, therefore, no violation of the equal protection clause.

Petition for rehearing was denied on June 9, 1943, and on June 21, 1943, the mandate was issued to the United States District Court (R. 72). The judge of the trial court issued an order staying further proceedings and withholding the filing of the mandate on July 19, 1943, a certified copy of which order is printed in the appendix.

II.

STATEMENT OF BASIS OF JURISDICTION

It is believed that the jurisdiction of this Court to review the judgment in question is sustained by:

Section 240 of the Judicial Code as amended (Title 28, Sec. 347, Subd. [a], U. S. C. A.)

Rule 38, Section 5, Subsec. (b), Rules of the Supreme Court as amended.

III.

QUESTION PRESENTED

Correctness of the Circuit Court's decision that Oklahoma had power, despite the equal protection clause, to levy a heavily discriminatory tax on a foreign insurance company's 1941 business during the year 1941, after the

company's due admission to the state in compliance with laws then in force, and at a time when the foreign company stood on an equal plane with domestic companies, under Oklahoma law, and pending the business year already authorized.

IV.**REASONS RELIED UPON FOR THE ALLOWANCE
OF THE WRIT**

This case presents questions of first importance relating to the constitutionality of a form of tax drastically increased by a state legislature after a period of many years during which foreign insurance companies had built up a valuable and irreplaceable business representing the outlay of extensive capital, and those questions have not heretofore been passed upon by this Court. An authoritative decision is of pressing importance, not only to the parties to this cause, and not only to all foreign insurance companies doing business in Oklahoma, but also to the insurance business generally. The decision sought to be reviewed here is based squarely upon the merits of the constitutional issue presented and was based upon a complete stipulation of all facts.

From an economic standpoint it is obvious that a 4% tax upon the gross of a foreign company's income is prohibitively discriminatory when not shared in any respect by a few directly competing domestic insurance companies who are not required to pay even a fraction of that amount through the medium of other forms of taxes. The precedent established

by the Circuit Court's opinion is of the utmost importance to many Oklahoma insurance policyholders and in the interest of the public should be reviewed before the legislatures of various other states seek to adopt similar discriminatory laws. Aside from the novelty and importance of the issues presented, the decision below should be reviewed for the reason that it is clearly erroneous and not in accord with the principles of applicable decisions of this Court in the following cases, among others:

Hanover Fire Insurance Company v. Harding, 272 U. S. 494, 71 L. ed. 372, 47 S. Ct. 179;

Southern Railway Company v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287;

Air-way Electric Appliance Corporation v. Day, 266 U. S. 71, 69 L. ed. 169, 45 S. Ct. 12;

Concordia Fire Insurance Company v. People of the State of Illinois, 292 U. S. 535, 78 L. ed. 1411, 54 S. Ct. 830;

Quaker City Cab Company v. Commonwealth of Pennsylvania, 277 U. S. 389, 72 L. ed. 927, 48 S. Ct. 553;

St. Louis Cotton Compress Company v. State of Arkansas, 260 U. S. 346, 67 L. ed. 297, 43 S. Ct. 125;

Power Manufacturing Company v. Saunders, 274 U. S. 490, 71 L. ed. 1165, 47 S. Ct. 678;

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357.

Insofar as the decision sustains the validity of the taxing act, we submit that it should be reviewed for the additional reason that it is not in accord with the principles of

the following decision of the then 8th Circuit Court of Appeals:

Sneed v. Shaffer Oil and Refining Company, 35 Fed. (2d) 21 (C. C. A. 8th Cir., Sept., 1929).

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued from and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the 10th Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment and decree of the said United States Circuit Court of Appeals for the 10th Circuit be reversed by this Honorable Court, and that your petitioner have such other and further relief as to this Court may seem proper.

GREAT NORTHERN LIFE INSURANCE COMPANY,

BY HENRY S. GRIFFING,

JOHN A. JOHNSON,

2701 First National Bldg.,

Oklahoma City, Oklahoma;

HERBERT R. TEWS,

11 So. LaSalle Street,

Chicago, Illinois,

Counsel for Petitioner.

APPENDIX ONE

Sections 1 and 2, Chapter Ia, Title 36, Pages 121 and 122, Oklahoma Session Laws 1941 (36 O. S. 1941, page 121).

HOUSE BILL No. 353

AN ACT amending Section 10478 and Section 10479, Oklahoma Statutes 1931; providing for an annual tax of four per cent (4%) on all premiums collected in this state, with certain deductions to be paid by all foreign insurance companies doing business in the State of Oklahoma; extending the provisions of such statute to include every foreign corporation, co-partnership, association, inter-insurance exchange or individual who is a non-resident of the State of Oklahoma, doing an insurance business of any nature whatsoever; and providing for the distribution and appropriation of such taxes; and declaring an emergency.

"Be It Enacted by the People of the State of Oklahoma:

"REPORTS—GROSS PREMIUMS.

"Section 1. That Section 10478, Oklahoma Statutes of 1931 be, and is, hereby amended to read as follows:

"Every foreign insurance company, co-partnership, association, inter-insurance exchange or individual who is a non-resident of the State of Oklahoma, doing business in the State of Oklahoma in the execution of exchange contracts of indemnity, or as an insurance company of any nature or character whatsoever, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of

Oklahoma, and an annual tax of four per cent (4%) on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted which tax, in addition to an annual tax of three dollars (\$3.00) on each agent, to be paid to the State Insurance Board as now provided by Section 10542, Oklahoma Statutes 1931, shall be in lieu of all other taxes or fees, and the taxes and fees of any sub-division or municipality of the state. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars (\$500.00); and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this state until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this state.'

"REPORT AND DISBURSEMENT.

"Section 2. That Section 10479, Oklahoma Statutes 1931, be, and is, hereby amended to read as follows:

"The Insurance Commissioner shall report and disburse all taxes collected under Section 1 hereof and the same are hereby appropriated as follows, to-wit:

"(a) One-half or fifty (50%) per cent of the four (4%) per cent collected on all premiums by fire insurance companies in this state, shall be allocated and disbursed for the firemen's relief and pension fund as provided for in Sections 6110, 6111, 6112 and 6113 of the Oklahoma Statutes 1931.

"(b) All the balance and remainder of the annual tax of four (4%) per cent provided for in Section 1 hereof shall be paid to the State Treasurer to the credit of the General Fund of the State.

"The Insurance Commissioner shall keep an accurate record of all such funds and make an itemized statement

and furnish same to the State Auditor, as do other departments of this state. The report shall be accompanied by an affidavit of the Insurance Commissioner or the chief clerk of his office certifying to the correctness thereof. Provided that nothing herein shall be construed as repealing or affecting the provisions of Section 3744 of the Oklahoma Statutes 1931.'"

Approved April 25, 1941. Emergency.

APPENDIX TWO

"In the District Court of the United States for the Western District of Oklahoma.

"Great Northern Life Insurance Company, a Corporation, Plaintiff, vs. Jess G. Read, Insurance Commissioner for the State of Oklahoma, Defendant.—No. 1009.

"Order Staying Further Proceedings Pending Application for Writ of Certiorari to the Supreme Court of the United States.

"Upon a showing by Great Northern Life Insurance Company, plaintiff herein, of its purpose and desire to make application to the Supreme Court of the United States for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit, and a further showing that no rights of defendant will be prejudiced by an order staying further proceedings in this cause pending the filing of such application.

"It is, therefore, ordered that further proceedings in this cause be stayed and that the filing of the mandate heretofore issued be withheld pending the filing of plaintiff's application for writ of certiorari to the Supreme Court of the United States and the further prosecution of such writ, if and in the event that the same be granted.

"Bower Broaddus,

"Judge of the United States District Court.

"O. K.

"Henry S. Griffing;

"John A. Johnson.

"By John A. Johnson,

 "Attorneys for Plaintiff.

"Mac Q. Williamson,

 "Attorney General of Oklahoma;

"Fred Hanson,

 "Assistant Attorney General of Oklahoma.

"By Fred Hanson.

"Endorsed: Filed July 19, 1943. Theodore M. Filson,
clerk.

"Attest: A true copy of the original order.

"Theodore M. Filson, Clerk.

"By Margaret P. Blair, Deputy.

(Seal)"

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI**

**I.
STATEMENT**

The opinion of the Circuit Court of Appeals sought to be reviewed is yet unreported but is shown in the record (R. 44-51). A statement of the grounds on which the jurisdiction of this Court is invoked was placed in the petition under heading No. II and is, therefore, not repeated. In the interest of brevity no further statement of the case will be recited, since a summary statement has previously been incorporated with page references, and that statement is adopted as a part of this brief. For the sake of clarity it will be necessary to make references to admitted allegations and stipulations of fact as a part of the argument.

**II.
ASSIGNMENT OF ERROR**

The court erred in its decision holding that Oklahoma had power, despite the equal protection clause, to levy a heavily discriminatory tax on a foreign insurance company's 1941 business during the year 1941, after the company's due admission to the State in compliance with laws then in force, and at a time when the foreign company stood on an equal basis with domestic companies under Oklahoma law, and pending the business year already authorized.

III.**ARGUMENT****Synopsis of Argument**

In support of the assigned error, the petitioner asserts the following propositions, to be presented and considered in order:

PROPOSITION I.

Under the Oklahoma Constitution and the taxing act, the gross premiums tax is not an entrance fee levied under the state's police power, but a general revenue producing measure imposed under the taxing power.

PROPOSITION II.

Since the 4% gross premiums tax is not a condition precedent to a license renewal, it is immaterial that the company's permission to do business expired February 28, 1942.

PROPOSITION III.

The law imposing a greater tax burden on business done during 1941, the year for which the company had previously been admitted to the state, was invalid; therefore, Oklahoma had no power to require a showing of past compliance with said law as a condition precedent to renewal of the company's license for the year 1942.

PROPOSITION IV.

Haying secured the right to do business in Oklahoma on February 28, 1941, the company stood equal with all competing domestic companies, and the tax law made to apply thereafter did not conform to the equal protection clause since no substantial difference exists between foreign and competing domestic companies which would justify a classification for tax purposes.

PROPOSITION I.

Under the Oklahoma Constitution and the taxing act, the gross premiums tax is not an entrance fee levied under the state's police power, but a general revenue producing measure imposed under the taxing power.

It is conceded that Oklahoma could have constitutionally excluded foreign insurance corporations from entering its jurisdiction to do business, and the exclusion could have been arbitrary. It is also fundamental that the state may impose conditions upon the permission extended such foreign corporations, the only limitation being that the conditions required do not include a waiver or surrender of the rights secured to foreign corporations by the Constitution of the United States.

The 1941 Gross Premiums Taxing Act was passed pursuant to Sections 1 and 2 of Article XIX of the Constitution of Oklahoma, which read in part as follows:

"1. Foreign Insurance Companies—Conditions of Doing Business.

"No foreign insurance company shall be granted a license or permitted to do business in this state until it shall have complied with the laws of the state, including the deposit of such collateral or indemnity for the protection of its patrons within this state as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license.

"2. Entrance Fees—Annual Tax.

"Until otherwise provided by law, all foreign insurance companies, including surety and bond companies, doing business in the state, except fraternal insurance companies, shall pay to the Insurance Commissioner for the use of the state, an entrance fee as follows:

"Each foreign life insurance company, per annum, two hundred dollars

"Until otherwise provided by law, domestic companies excepted, each insurance company, including surety and bond companies, doing business in this state, shall pay an annual tax of two per centum on all premiums collected in the state, after all cancellations are deducted, and a tax of three dollars on each local agent."

It is significant that in both the state constitutional sections and under the 1941 taxing act, the entrance fee of \$200.00 is segregated and distinct from the annual gross premiums tax. In both the Constitution and the statute the entrance fee is stated to be a definite sum. The tax which follows is not labelled as a part of the entrance fee. Only by a strained construction can the tax be tied to the entrance of the foreign company into the state. The Oklahoma Supreme Court has not construed either the constitutional provisions of the statute to determine whether the gross premiums tax is also an entrance fee levied under the state's police power or merely an annual revenue producing measure imposed under the taxing power and intended to be effective only when the foreign insurance companies indicated have been admitted to the state and after they have engaged in business.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 19

In *New York Life Insurance Co. v. Board of County Commissioners of Oklahoma County*, 155 Okla. 247, 9 Pac. (2d) 936, the Oklahoma Court determined that the gross premiums tax was not a property tax, but a privilege tax. Constitutionality of the gross premiums tax was not involved, nor was there any determination that this tax is a condition precedent either to original entry into the state by foreign corporations or for subsequent annual renewal of the license to continue in business. This Court, although bound by the construction that the Supreme Court of Oklahoma may place upon the statute, is not bound by the characterization of the tax so far as that characterization may bear upon the question of its effect under the Federal Constitution: *Hanover Fire Insurance Company v. Harding*, 272 U. S. 494, at 511.

It is, therefore, submitted that the language of Sections 1 and 2 of Article XIX of the Oklahoma Constitution and the language of the tax act clearly indicate that the amount set forth in dollars is the entrance fee required by the state of a foreign corporation, and that the annual gross premiums tax is in no sense tied in with the requirements for entry, but rather is a privilege tax which must be justified, if at all, under the taxing power, as limited by the constitutional requirement of uniformity upon the same classes of subjects.

PROPOSITION II.

Since the 4% gross premiums tax is not a condition precedent to a license renewal, it is immaterial that the company's permission to do business expired February 28, 1942.

The Circuit Court's opinion is primarily predicated upon the decision that the license of a foreign insurance company expires on the last day of February next after its issuance; that it was, therefore, within the power of the state to change the conditions of admission at any time as to subsequent license years (R. 49). It is petitioner's position that, unless the gross premiums tax is a condition precedent to original entry into the state by a foreign corporation, it cannot be a condition precedent for any subsequent license year and is, therefore, invalid if discriminatory. Petitioner's case is rested upon the opinion of this Court in *Hanover Fire Insurance Company v. Harding*, cited *supra*.

In that opinion the decisive question was whether the Illinois net receipts tax constituted a condition precedent to the annual renewal of the license of the foreign insurance company. The Illinois Supreme Court had previously ruled that said net receipts tax was a privilege tax and not a tax on personal property, *People ex rel. City of Chicago v. Kent*, 133 N. E. 276; *People ex rel. City of Chicago v. Barrett*, 139 N. E. 903. In the *Hanover* case the Supreme Court of Illinois conceded that the net receipts tax could not be a condition precedent, since it was necessary for the company to engage in business in the state prior to the time that the tax was

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 21

paid in order that there might be a basis for computation of the tax. *Hanover Fire Insurance Company v. Carr*, 148 N. E. 23. This Court ruled that, since the net receipts tax was not a condition precedent to the annual renewal of a license, and since the company had previously complied with all actual conditions precedent, the net receipts tax was not an exercise of the state's police power.

The Oklahoma gross premiums tax is identical with the Illinois net receipts tax in that it is physically impossible for said tax to be a condition precedent to the entry of a foreign life insurance company into Oklahoma. When such a company enters a state for the first time it pays a \$200.00 entrance fee (Sections 1 and 2, Article XIX, Oklahoma Constitution). It files a copy of its charter and statement of its financial condition, and satisfies the Insurance Commissioner that it is legally organized under the laws of a foreign state and that it has on deposit with prescribed officials designated securities. It demonstrates that it has a paid up or guaranty capital or surplus of the prescribed amount, and it appoints the Insurance Commissioner as its service agent. These conditions precedent to the issuance of a license are prescribed by Section 101, Title 36, Oklahoma Statutes 1941. Upon complying with these conditions precedent to admission into the state, a license is issued. The company pays no tax upon gross premiums because it has collected no premiums in Oklahoma. Since it is absolutely impossible for the gross premiums tax to be a condition precedent to the issuance of an

original license, clearly it is not an exercise of the state's police power, and cannot be a condition precedent to any subsequent license renewal.

The Circuit Court concedes that the gross premiums tax paid at the expiration of a license year is exacted for the privilege, previously enjoyed, of having been permitted to do business in Oklahoma during the license year then expiring (R. 48). This concession confesses that the corporation has been admitted to the state and placed upon an equal basis with competing domestic corporations by complying with conditions precedent to the issuance of its license, prior to the time for payment of the gross premiums tax.

On or before February 28, 1941, this petitioner paid \$300.00 to the Insurance Commissioner of Oklahoma as its entrance fee for the license year commencing March 1, 1941, and received a license which was not to expire for a period of one year. Thereafter, the 4% gross premiums tax became effective April 25, 1941, as an emergency measure. It was applied to the entire year of 1941. It was given no prospective operation, but became effective immediately upon its passage. We agree with the Circuit Court that this tax was exacted for the privilege of doing business in Oklahoma during 1941, the year in which the tax was levied, but since it was not a condition precedent to the annual license *already issued*, it is submitted that the fact that petitioner's license to do business expired on the following February 28, 1942, is immaterial.

PROPOSITION III.

The law imposing a greater tax burden on business done during 1941, the year for which the company had previously been admitted to the state, was invalid; therefore, Oklahoma had no power to require a showing of past compliance with said law as a condition precedent to renewal of the company's license for the year 1942.

As previously indicated, Great Northern Life Insurance Company obtained a license renewal for 1941 and was entitled to do business in Oklahoma for the entire license year expiring February 28, 1942. Although the Circuit Court opinion admits that the present tax was paid for the privilege previously enjoyed during that year, so that it could not have constituted a condition precedent to the issuance of a license long since granted, it seeks to justify the payment of the tax as a condition precedent to the renewal of the license for the year commencing March 1, 1942 (R. 51). The Illinois Supreme Court sought to apply the same justification to the Illinois net receipts tax in the Hanover case. This Court, in re-affirming *Southern Railway v. Greene*, 216 U. S. 400, said:

"In the Greene case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens" (p. 509).

The period of business permitted by Oklahoma commenced March 1, 1941, and expired February 28, 1942. For that period, Oklahoma enforced against this licensee a

gross premiums tax which was not a condition precedent to the issuance of the 1941 license. Not being a condition precedent it could only have been an exercise of the taxing power of the state. The tax was grossly discriminatory and was, therefore invalid. Oklahoma required the tax to be paid if required, as a condition precedent to the renewal, before it would renew the license for 1942, but in so doing compliance with an act which was invalid in its inception and which necessarily remained invalid; therefore, could not be a valid condition for issuance of the 1942 license.

No language better illustrates the lack of power to require payment of the 1941 tax as a condition precedent to the right to continue in business for the year 1942, than that employed in this Court's opinion in the Hanover case:

"Of course, at the end of the year for which the license has been granted, the state may in its discretion impose as a condition precedent for a renewal license past compliance with its valid laws; but that does not enable the state to make past compliance with Section 30, a condition precedent to a renewal of the license, if as we find that section violates the Fourteenth Amendment, for, as already said, while a state may forbid a foreign corporation to do business within its jurisdiction or to continue it, it may not do so by imposing on a corporation a sacrifice of its constitutional rights" (p. 514).

PROPOSITION IV.

Having secured the right to do business in Oklahoma on February 28, 1941, the company stood equal with all competing domestic companies, and the tax law made to apply thereafter did not conform to the equal protection clause since no substantial difference exists between foreign and competing domestic companies which would justify a classification for tax purposes.

Petitioner's complaint alleged that domestic insurance companies incorporated in Oklahoma are authorized by charter to write contracts of insurance identical with those of petitioner, and that such domestic corporations directly compete with petitioner (R. 6). This is admitted by the answer (R. 14) and paragraph two of the stipulation of facts further demonstrates the discrimination (R. 22). The trial court, in his conclusions of law determined that the fact that the 4% premium tax law discriminated heavily against foreign insurance companies in favor of competing domestic insurance companies and resulted in the collection of taxes greatly exceeding the expenses of operating the Oklahoma Insurance Department did not make the tax law unconstitutional under the Fourteenth Amendment (R. 33).

It is not disputed that petitioner has developed an extensive and valuable insurance business in Oklahoma during its twenty-year stay in that state; it has from year to year secured renewals of its license and has through many years past built a large good-will in the State of Oklahoma. If it has now been denied the equal protection of the laws, the

value of all of this investment may be destroyed. The protection of just such an investment was the foundation stone in this Court's opinion in the Hanover case. The Circuit Court in the present case has given these factors no consideration.

When a corporation of another state has come into the taxing state in compliance with its laws, and has therein acquired property of a fixed and permanent nature upon which it has paid all taxes levied by the state, it is not liable for a new and additional franchise tax for the privilege of doing business within the state which tax is not imposed upon domestic corporations doing business in the state of the same character as that in which the foreign corporation is itself engaged.

Southern Railway Company v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287.

The record discloses that from November 16, 1907, to December 31, 1941, the total receipts of the Oklahoma Insurance Department from the 2% tax on gross premiums of foreign insurance companies and from the annual entrance and agent fees, aggregate \$25,585,107.34, while the department's expenses during that period were \$910,107.34, or 3.55% of the total receipts. The tax rate and the total receipts, have since been doubled and expenses of the department are now no more than 2% of its gross receipts (R. 23). It is submitted that the premiums tax law is, therefore, not a measure designed to raise only sufficient revenue to enable the state to regulate foreign insurance companies and to

thereby protect its citizens as policy holders, but obviously is a revenue producing measure, and as stated by this Court in the Hanover case:

"By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign within the state, and tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the Fourteenth Amendment" (p. 515).

Doubling the annual license fee paid by foreign corporations in Oklahoma, not required of competing domestic corporations, has been held in contravention of the Fourteenth Amendment. *Sneed v. Shaffer Oil and Refining Company*, 35 Fed. (2d) 21.

While reasonable classification between corporations doing different types of business is permitted for the purpose of imposing a different rate of taxation, without doing violence to the equal protection clause, such classification must be based upon a real and substantial distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed, and a classification based solely upon the fact that corporations excluded from the operation of the tax are domestic corporations, while those embraced by the taxing act are domesticated in states other than the taxing jurisdiction, is an arbitrary selection which cannot be justified by calling it classification.

Southern Railway Company v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287;

Royster Guano Company v. Virginia, 253 U. S. 412, 64 L. ed. 989, 40 S. Ct. 560;

Hopkins v. Southern California Telephone Company, 275 U. S. 393, 72 L. ed. 329, 48 S. Ct. 180; *Quaker City Cab Company v. Pennsylvania*, 277 U. S. 389, 72 L. ed. 927, 48 S. Ct. 553; *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 76 L. ed. 265, 52 S. Ct. 133.

CONCLUSION

In this case there is clearly such a palpable inequality between the tax burden imposed upon foreign insurance companies in Oklahoma and the benefits received by them from the state as to amount to an arbitrary taking of their property without compensation, and there is a denial of the equal protection of the laws. It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit and thereafter reviewing and reversing said court's decision.

Respectfully submitted,

GREAT NORTHERN LIFE INSURANCE COMPANY,

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Counsel for Petitioner.

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Office - Supreme Court, U. S.

FILED

OCT 14 1943

CHARLES ELMORE CROPLEY
[REDACTED]

In the
Supreme Court of the United States
OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

vs.

JESS G. READ, Insurance Commissioner for the
State of Oklahoma,

Respondent.

R E P L Y B R I E F

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In the
Supreme Court of the United States
OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

vs.

JESS G. READ, Insurance Commissioner for the
State of Oklahoma,
Respondent.

R E P L Y . B R I E F

A R G U M E N T

The brief in response to the petition for writ of certiorari filed herein does not meet the single issue presented by the petitioner. For this reason a reply brief is deemed necessary to prevent diversion of the Court's attention.

Respondent's brief reprints the question involved and indicates at page five thereof that the question is "appar-

ently limited" to the validity of the 1941 amendatory act rather than to the amended Sections 10478-9, Oklahoma Statutes 1931. The question is not only apparently so limited, but is actually and absolutely limited; petitioner has no intention of presenting either an hypothetical situation nor abstract questions of law.

It is insisted that a decision herein would apply only to the instant case since but two life insurance companies have challenged the application of the 4 per cent tax, but these challenges are test cases which do not, of themselves, prevent actions by other foreign insurance companies doing business in Oklahoma. Petitioner is not asking the Court to decide as to premium taxes collected subsequent to the premium tax involved herein, but instead requests a ruling on the situation actually and presently existing. Therefore, petitioner respectfully directs the attention of the Court to the actual question presented in its brief as distinguished from what the respondent calls "the basic proposition actually involved" at page six of the brief in response. The meat of the question is whether petitioner may be taxed upon a privilege already granted.

The Lincoln Life Insurance Case

In support of the contention that the decision of the District Court for Oklahoma County, Oklahoma, in the case of *Lincoln Life Insurance Company v. Jess G. Read*, is binding upon this Court, petitioner cites *Fidelity Union Trust*

Company et al. v. Field, 311 U. S. 169, 85 L. ed. 109, 61 S. Ct. 176, based upon decisions of the Court of Chancery of the State of New Jersey. It will be observed that the cited case was predicated upon final Court of Chancery decisions which had not been reviewed by appellate New Jersey courts and were, therefore, complete and final adjudications. The Lincoln Life Insurance Company case is now being appealed and is not final. It was only a ruling upon a demurrer and there was no stipulation of facts or trial. The record discloses (R. 39) that the journal entry of judgment was prepared by counsel for respondent in this case.

This journal entry of judgment, in holding that the gross premiums tax was paid for the privilege of *having been* permitted to do business in Oklahoma during the *expiring* license year, correctly states the fact that the insurance commissioner required a showing of past compliance with the gross premiums tax law before he would renew the annual license, but does not determine that said 4 per cent tax was a legally valid condition precedent to doing business during the *ensuing* license year. Thus the District Court of Oklahoma County did not rule upon the question of law presented to this Court.

Petitioner admits that respondent required it to show that it had paid the 1941 4 per cent gross premiums tax before he would renew petitioner's license for 1942. The issue now is whether respondent had the constitutional right to require this showing of past compliance with the 1941 act

challenged herein. It is imperative that it be determined whether the 4 per cent tax was imposed as a condition precedent to the 1941 license year in view of the fact that before the additional tax was imposed the state had already authorized the transaction of business during that license year. If said tax was not a condition precedent to this license year, then the respondent had no constitutional right to require a showing that petitioner had complied with the law before renewal of the 1942 license.

In this connection, petitioner is acceding to the argument of counsel that foreign insurance companies are "within the State of Oklahoma" only from year to year; but this is merely an admission *arguendo* for the purpose of narrowing the issue. Thus, even if petitioner be considered as within the state only for the license year commencing March 1, 1941, the additional tax burden was imposed after petitioner's admission for that year, and was neither in fact nor in law a condition precedent to said business period.

No decision of a state court, whether final or not, is regarded as the rule of decision in the courts of the United States where the question involves the Constitution of the United States. *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817.

**The Gross Premiums Tax Was Not a Condition
Precedent to the 1941 License Year.**

Respondent's reference to the case of *Pacific Mutual Life Insurance Company v. Hobbs* (Kansas 1940), 103 Pac. (2d) 854, confirms the fact that the tax paid in the present case was paid for the privilege enjoyed in 1941, and that the payment followed exercise of the privilege. It will be seen at page thirteen of the brief in response that plaintiff company in the Kansas case adopted the theory that the taxes were "paid for the privilege of doing business in Kansas during the *ensuing* year." This likewise appears to be the theory advanced by the respondent herein. The Kansas opinion correctly held that the tax was not a prospective privilege tax, but was paid for the preceding year, and that to hold otherwise would permit a foreign company coming into the state for the first time to "be exempt from taxation on the business done in the first year, if it withdrew at the end of the first year."

In this Court's opinion in the case of *Hanover Fire Insurance Company v. Harding*, 272 U. S. 494, 71 L. ed. 372, 47 S. Ct. 179, a principal turning point was whether the net receipts tax was a condition precedent to the right to do business during the year in which the tax was collected. Said tax was designated as Section 30. This Court said:

"What, therefore, we have to decide here is whether the application of Section 30 can be one of the conditions upon which the insurance company is admitted to do business in Illinois, or whether under the law of 1919 the authority granted by the department of trade

and commerce for which the company paid 2 per cent of gross premiums received the previous year by it put it upon a level with domestic insurance companies doing business of the same character.

"It is plain that compliance with Section 30 is not a condition precedent to permission to do business in Illinois"

Respondent asserts that this Court determined that the Illinois gross premiums tax mentioned in the Hanover decision was a constitutional tax. The constitutionality of said tax was not involved nor challenged. It was not an issue in the case, other than as an assumed condition precedent. Had it been the tax questioned, an examination of the Illinois gross premiums taxing act will disclose that said act is entirely dissimilar to the Oklahoma 1941 act and that in its application the gross premiums tax is actually paid for the ensuing license year. See Cahill's Illinois Revised Statutes 1925, c. 73, Sec. 79. Section fourteen of the Illinois laws of the Fifty-first General Assembly (1919) clearly shows that as to corporations qualified to do business in Illinois prior to the time of the passage of the act the gross premiums tax was paid for the privilege of doing an insurance business in the state for the ensuing year and that it was paid in advance of the issuance of the license. The same form of taxing act was involved in the case of *Philadelphia Fire Association v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 S. Ct. 108, considered at page twenty of the brief in response. The petitioner concedes that it may be quite possible for a gross premiums tax to be applied as a condition precedent, and,

therefore, to be constitutional under the Fourteenth Amendment, but believes that the 1941 Oklahoma act was not a condition precedent to the 1941 license year, either in law or in fact. As said by Chief Justice Taft in the *Hanover* case, *supra*:

"• • • but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens" (page 509).

At page 27 of the response brief, referring to the *Hanover* case, it is said that this Court held "in effect" that so long as the net receipts tax was computed upon the debased value, as was other personal property, it was not discriminatory or invalid. This was neither the substance nor the effect of the holding. See *Concordia Fire Insurance Company v. People of State of Illinois*, 292 U. S. 535, 78 L. ed. 1411, 54 S. Ct. 830, at which time the Illinois Supreme Court had ruled that the net receipts tax was, after all, a tax on personal property, and was thus a constitutional imposition. In the *Concordia* case, this Court held that the tax was still discriminatory and invalid, and subject to the same objections mentioned in the *Hanover* case whether treated as an excise tax or a property tax. This Court ruled that the plaintiff had not sustained its burden of proving either that competing domestic companies did not pay other taxes from which foreign companies were exempt or that the tax burden was not otherwise equalized. It was this decision which led to stipulation of fact No. 2 herein (R. 22-27) in which it is

agreed that domestic companies pay no taxes not likewise paid by plaintiff, except an annual income tax, the amount of which approximates 1/20th of the amount which a 4 per cent tax would bring if placed on the premiums collected by domestic companies.

Petitioner likewise disagrees with the contention, stated at page 28 of the response brief, that in the Hanover case this Court "in effect" held that while the net receipts tax was a "privilege tax," same was not paid "for the license or privilege to do business in the state." The Supreme Court of Illinois had ruled that the net receipts tax was a new and additional privilege tax. *Hanover v. Carr*, 317 Ill. 366, 148 N. E. 23. What this Court actually held is best expressed in the words of the author of the opinion:

"It is true that the interpretation put upon such a tax law of a state by its supreme court is binding upon this court as to its meaning, but it is not true that this court in accepting the meaning thus given may not exercise its independent judgment in determining whether with the meaning given, its effect would not involve a violation of the Federal constitution."

In like manner, the Oklahoma Supreme Court has said that the 2 per cent gross premiums tax law was a "privilege tax." *New York Life Insurance Company v. Board of Commissioners of Oklahoma County*, 155 Okla. 247, 9 Pac. (2d) 936. This Court can determine whether, admitting that the 4 per cent gross premiums tax law is a "privilege tax," the same was a valid condition precedent to the yearly period of business enjoyed by this petitioner and commencing on March

1, 1941. Certain parts of the New York Life Insurance Company case are quoted in the response brief. The quotations do not disclose that the Oklahoma Supreme Court recognized that limitations upon a state's powers toward foreign insurance companies are imposed by the Constitution of the United States. The Oklahoma Court was not determining the constitutionality of the old premiums tax act. It was deciding that it was an excise tax, so that the provision in the statute that such tax should be "in lieu of all other taxes or fees" was found to mean "in lieu of all other (*Excise*) taxes."

Petitioner admits that the tax herein is an excise tax. It does not admit that it was a condition precedent to petitioner's right to do business in 1941, since it was not paid until the expiration of said license year, and was not imposed until after petitioner had complied with all conditions prerequisite to the issuance of a license for that year. It would seem impossible for a state to grant a privilege, then, six weeks later, to levy an additional and grossly discriminatory charge (which makes no effort to be prospective) for the same privilege.

The Shaffer Oil and Refining Company Case

Respondent seeks to distinguish *Sneed, Treasurer, v. Shaffer Oil and Refining Company et al.*, 35 Fed. (2d) 21, on the ground that foreign corporations other than insurance companies receive no annual license from the Oklahoma

Insurance Commissioner, but instead receive a twenty-year license from the Secretary of State. The Circuit Court of Appeals' opinion points out that every such foreign corporation doing business in this state must "procure annually from the corporation commission a license authorizing the transaction of such business in this state." The license fee paid therefor was disproportionate to the amount required of domestic corporations. One of the penalties for failure to obtain this *annual* license was ouster of the foreign corporation from the state. It was this annual privilege tax which the then Eighth Circuit Court of Appeals held to be unconstitutional, following the doctrine of the Hanover case. Obviously a twenty-year license gave foreign corporations no more tenure in the state than an annual license gives to foreign insurance companies.

Gross Premiums Tax Laws of Other States

The brief in response reprints portions of a "Taxation Manual" at page 19. While this manual is not a part of the record of this case it is helpful in conveniently showing to the Court the heavy discrimination existing under the Oklahoma tax laws as compared with the somewhat similar laws of other states. Apparently the laws of other states have a general tax inequality on premiums of from $1\frac{1}{2}\%$ to 2%. The inequality in Oklahoma is 4%. The manual does not disclose whether or not substantial equality may have been achieved in the listed states by the imposition of other

and different taxes upon domestic insurance companies, from which taxes foreign companies are exempt. It is also possible that in some of those states, as in Illinois and in New York, the premiums taxes are actually valid conditions precedent to the right to do business during an ensuing license year. If so, they would represent a constitutional exercise of the state's police power.

But none of the statutes of other states, and none of the proportionate tax burdens of other states are on trial here. The 1941 Oklahoma act is by far the most discriminatory act in the United States. The "Taxation Manual" serves to emphasize the importance of the question herein involved and further justifies the issuance of a writ of certiorari by this Court.

**A Person Enforcing an Unconstitutional State Statute
Does Not Represent the State**

One who is enforcing or is attempting to enforce an unconstitutional state statute, is stripped of his official character and is not possessed of immunity from suit under the Eleventh Amendment. *Ex parte Young*, 209 U. S. 123, 52 L. ed. 715 at 729, 28 S. Ct. 441; *Ex parte La Prade*, 289 U. S. 444, 77 L. ed. 1311, 53 S. Ct. 682.

Where a state officer has collected money under an unconstitutional statute and still has possession of such money, he is subject to a suit to reclaim the amount. This is doubly true where a state statute contemplates the course taken by

the plaintiff and provides against any difficulty in which the state officer might find himself. *A. T. & S. F. Railway Company v. O'Connor*, 223 U. S. 279, 56 L. ed. 436, 32 S. Ct. 216. The brief in response attempts to distinguish this opinion upon the ground that O'Connor was not sued in a representative capacity, but was sued individually. If such had been the case, this Court would have had no occasion to mention the state statute providing for a refund of taxes erroneously paid to the secretary of state.

Petitioner herein brought this action against "Jess G. Read, Insurance Commissioner," not against "Jess G. Read, as Insurance Commissioner." It is inconceivable to petitioner that this Court, or any court, would base the right of constitutional protection upon a descriptive designation affixed to the defendant by the plaintiff taxpayer. The descriptive phrase does not alter the unofficial character of respondent's action.

If a state statute is unconstitutional, the person injured thereby is entitled to relief from the action taken or about to be taken under color thereof. *Monamotor Oil Co. v. Johnson, State Treas.*, 3 Fed. Supp. 189; *Porter v. Beha, Supt. of Ins.*, 12 Fed. (2d) 977; *Roadway Express v. Murray et al.*, 65 Fed. (2d) 293; *Southern Pac. Co. v. Conway*, 115 Fed. (2d) 746.

The gravamen of all opinions, both prior and subsequent to the Eleventh Amendment has been, first, a determination as to whether the money sought has been placed in

the general treasury and co-mingled with the state's funds and, second, whether the state has consented to the suit. Both objections are eliminated herein. See stipulation of fact No. 1 (R. 22-27) that the sum paid by petitioner "has been held by defendant separate and apart from the General Revenue Fund of the State Treasury of Oklahoma." The second objection is eliminated by Section 12665, Oklahoma Statutes 1931.

CONCLUSION

Petitioner respectfully requests issuance of the writ.

Respectfully submitted,

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October, 1943.

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In the
Supreme Court of the United States
OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,

Petitioner,

Against

JESS G. READ, Insurance Commissioner
for the State of Oklahoma,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE TENTH CIRCUIT**

BRIEF OF PETITIONER

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December, 1943.

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BRIEF OF PETITIONER

This action was brought March 28, 1942, in the United States District Court for the Western District of Oklahoma, to recover the amount of taxes paid on gross insurance premiums collected in Oklahoma during 1941. Judgment for respondent was affirmed by the United

States Circuit Court of Appeals for the Tenth Circuit on May 7, 1943, in an opinion reported at 136 Fed. (2d) 44. This Court granted certiorari October 11, 1943.

JURISDICTION

Jurisdiction of this Court to review the judgment is found in Sec. 240 of the Judicial Code as amended (Tit. 28, Sec. 347, Subd. [a] U. S. C. A.); also pursuant to Rule 38, Sec. 5, Sub-section (b), Rules of the Supreme Court as amended.

STATEMENT OF THE CASE

Petitioner is a Wisconsin corporation, duly admitted and qualified to do business in Oklahoma. Respondent is a citizen of Oklahoma. The action is to recover \$8,189.32 which was the amount of taxes paid to respondent under protest. In addition to alleging this diversity of citizenship and to showing the existence of the requisite jurisdictional amount, the complaint alleges that the action arises under the Fourteenth Amendment (R. 3, 5). These averments are admitted by the answer (R. 11-12).

Petitioner was originally admitted into Oklahoma to do a life insurance business on December 5, 1922, and on December 28, 1922, its license was enlarged to include the issuance of health and disability insurance. It pursued this business in Oklahoma without interruption during the intervening years and to that end procured from the state

as of March 1 in each year a renewal of its license to transact its business in the state (Complaint, R. 4; Answer, R. 11, 12).

During its years of operating in the state, petitioner entered into contracts of insurance with approximately 6,000 policyholders within Oklahoma, it employed and trained forty-five agents throughout the counties of the state, it gathered and filed valuable factual and medical information concerning its policyholders in the state, and it built up a large and profitable business which cannot be leased or sold to other persons (R. 4, 12).

On and for years prior to March 1, 1941, the Oklahoma statute applicable required a foreign insurance company doing business in the state to pay an "entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of two per cent on all premiums collected" in the state "and an annual tax of three dollars on each local agent." Ch. 21, Art. I, Sec. 22, O. S. L. 1909; Sec. 10478, O. S. 1931 (Appendix I).

It is, and has been since 1909, the uniform administrative practice of the State Insurance Commissioner to require a foreign insurance company desiring, for the first time, to do business in Oklahoma to file an application for a license for a period to expire on the last day of the succeeding February. And on or before the expiration of this license period the foreign insurance company has been required, under the practice, to pay a tax on all

premiums, less proper deductions, received by it in Oklahoma after the date of its license and prior to the first day of the following January: The Commissioner has considered and treated this premiums tax as a tax paid by the foreign insurance company for the right or privilege of having entered the state during the calendar year preceding its payment and of having been permitted to do business in the state since its entry into the state and up to and including the end of the period covered by its license (R. 20, 21).

In case a foreign insurance company has been transacting business in Oklahoma pursuant to license prior to March 1 in some year and desires to continue in business for a subsequent license year, then in order to procure a license renewal the company, under this uniform administrative practice, is, and has been required, (a) to file on or before the last day of February of the expiring license year an application for a further license, and (b) to show that it has paid the tax on premiums collected during the preceding calendar year. At all times since 1909, in cases where license renewals are applied for, the Commissioner's uniform administrative interpretation has been that the tax on premiums received during the preceding calendar year is paid by the foreign company for the right or privilege of having been permitted to enter the state and of having done business therein during the license year expiring. The Commissioner considers that the annual license issued to foreign insurance companies

expires on the last day of February of each year (R. 21-22).

On March 1, 1941, petitioner received from the Insurance Commissioner of the state the usual renewal of its license which authorized it to conduct its business in Oklahoma during the license year which began on that date and was to extend until February 28, 1942 (R. 4, 11-12). One month and twenty-five days later, on April 25, 1941, the Oklahoma legislature passed, as an emergency measure an act effective immediately, which amended the previous statute relating to entrance fees and taxes imposed upon foreign insurance companies. Among other things the amendment levied an annual tax of 4 per cent on all premiums received by foreign insurance companies in the state and thus doubled the tax which had theretofore existed. Secs. 1 and 2, Ch. 1a., Tit. 36, pp. 121, 122, O. S. L. 1941; 36-O. S. 1941, Sec. 104 (Appendix II).

The administrative practices and interpretations with respect to the 4 per cent tax are the same as those applicable to the prior 2 per cent tax. The 4 per cent tax was levied and collected on all premiums received by foreign insurance companies in Oklahoma during the calendar year 1941 (R. 21, 22).

Obviously, when petitioner desired to procure a renewal of its license on March 1, 1942, the administrative practice required it to pay, and to show that it had paid, the 4 per cent tax levied by the act of April 25, 1941. In

order to comply with this requirement petitioner did, on February 28, 1942, pay to the Commissioner the sum of \$8,189.32, which was an amount equal to 4 per cent of all premiums, less proper deductions, received by it in the state during the calendar year 1941. This payment was made to the Commissioner under the conditions and provisions of a written protest filed with the Commissioner at the time that payment was made (R. 7-10). In this protest petitioner insisted that the payment was being made involuntarily and under duress, and that the 4 per cent gross premiums tax act was unconstitutional in that the tax was a levy of an arbitrary and discriminatory tax upon petitioner after it had been duly admitted to the State of Oklahoma and had become a quasi citizen thereof, and, therefore, denied to petitioner the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States (R. 7-10).

The sum paid by petitioner has been held by respondent separate and apart from the general revenue fund of the State Treasury of Oklahoma and will not be deposited in that fund unless and until there is a final adjudication against petitioner (R. 20, 25).

Life, accident and health insurance companies, domestic in Oklahoma and competing in that state with petitioner, do not pay any kind or type of taxes to the state which are not also paid by petitioner, except that those domestic companies pay an annual income tax from which tax petitioner is exempt. However, payment of this in-

come tax by foreign companies would produce only approximately one-twentieth of the amount which is produced by the 4 per cent tax imposed by the act of April 25, 1941 (R. 20).

During the period from November 16, 1907, and ending December 31, 1941, the Oklahoma Insurance Department collected and received in receipts from the 2 per cent tax on gross premiums of foreign insurance companies and from the annual entrance and agents' fees paid by such companies a total of \$25,585,107.34, while the expenses of the Department during that period aggregated \$910,107.34, or in other words, during that period the expenses were approximately 3.55 per cent of the total receipts. Since December 31, 1941, the expenses of the Department have been approximately only 2 per cent of the gross receipts of the Department (R. 20).

One month after it paid the tax, petitioner instituted this action and in its complaint averred, among other things, that it is threatened with deprivation of its property and investment in Oklahoma by the collection under duress by respondent of the taxes in question; that the April 25, 1941, statute is unconstitutional and contravenes the Fourteenth Amendment in that it attempts to impose this tax exclusively upon petitioner after it was duly admitted to the State of Oklahoma, but does not impose the tax on domestic insurance companies doing an identical type and kind of business in the state, and that the at-

tempted levy of an arbitrary and discriminatory tax upon petitioner while it was a person within Oklahoma and possessed of property, investment and business in the state, deprives petitioner of its rights under the Fourteenth Amendment (R. 5-6). The complaint also alleged that the Oklahoma laws provide no appeal from the action of respondent in collecting the tax involved (R. 6). In a supplement to the complaint petitioner averred that the tax act is not an entrance fee nor a regulatory measure enacted by virtue of the state's police power, but rather it is a revenue-producing measure, taxing the business of petitioner done during the year 1941 (R. 17, 18).

The answer asserts that the complaint fails to state a claim against respondent upon which relief can be granted, denies that petitioner is threatened with deprivation of its property by reason of the collection of the tax, and denies that the complete exemption of competing domestic life insurance companies from the premiums tax constitutes a violation of the Fourteenth Amendment (R. 11-13). Following a pre-trial conference, the case was tried upon a written stipulation of facts (R. 14-23). The district court made findings of facts which substantially followed the admitted allegations of the complaint and the stipulation of facts (R. 23-27). The trial court also made certain conclusions of law (R. 28-31).

Opinion of the Circuit Court of Appeals.

From an adverse judgment in the district court, petitioner took an appeal to the Circuit Court of Appeals for the Tenth Circuit where the judgment of the lower court was affirmed (R. 39-46).

By its opinion the Circuit Court of Appeals determined:

- (1) That annual licenses issued to foreign insurance companies doing business in Oklahoma expire on the last day of February next after they are issued.
- (2) That the 4 per cent gross premiums tax paid by petitioner on February 28, 1942, was a payment for the privilege of having been permitted to do business in Oklahoma during the license year expiring on that date and as a condition precedent to a license renewal for the ensuing year.
- (3) That since petitioner was only admitted to do business in Oklahoma until February 28, 1942, the state had the constitutional power to increase the tax burden during the course of that license year, and could refuse to renew the license for the succeeding license year in the absence of a showing that the tax had previously been paid.
- (4) That the decision of this Court in *Hanover Fire Insurance Company v. Harding*, 272 U. S. 494, 71 L. ed. 372, 47 Sup. Ct. Rep. 179, 49 A. L. R. 713, is distinguishable, the Court concluding that the state legislation did not violate the equal protection clause.

Petition for rehearing was denied on June 9, 1943, and on June 21, 1943, the mandate was issued to the

United States District Court (R. 47). The trial court issued an order, dated July 19, 1943, staying the filing of the mandate, a certified copy of which order was included as an appendix to the petition for writ of certiorari.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred in that:

- (1) It failed to hold that the "entrance fee" prescribed by Oklahoma law was and is the only payment required of foreign insurance companies as a condition precedent to entry into the state.
 - (2) It held that payment of the arbitrary and discriminatory gross premiums tax is a condition precedent to the original or subsequent entry into the state by a foreign insurance company.
 - (3) It held that payment of the gross premiums tax may follow entrance of the foreign insurance company into the state and yet be a condition precedent to such entry.
 - (4) It failed to hold that the gross premiums tax is a tax levied as a general revenue-producing measure and is not a tax levied in exercise of the police powers of the state.
 - (5) It held that Oklahoma had power, despite the equal protection clause, to levy a grossly discriminatory tax upon a foreign insurance company's 1941 business, by an act adopted on a date in that year which came after the company already had been duly admitted to the state and had been duly authorized to transact the business for that year.
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QUESTIONS PRESENTED

- (1) Did the United States District Court for the Western District of Oklahoma have jurisdiction of this cause?
- (2) Is the Oklahoma statute, effective April 25, 1941, unconstitutional because it denies to petitioner equal protection of the laws under the Fourteenth Amendment?

SUMMARY OF ARGUMENT

I.

The United States District Court had jurisdiction of this action.

- (a) The action is not a suit against the State of Oklahoma by a citizen of another state within the meaning of the Eleventh Amendment.
- (b) A diversity of citizenship exists and the matter in controversy exceeds the jurisdictional amount.
- (c) Even if this were considered to be an action against the State of Oklahoma the state has waived its immunity to suit in respect of the matter here involved, not only in the state courts, but also in the Federal courts.
- (d) This is a suit of a civil nature which arises under the Constitution of the United States and in which the matter in controversy exceeds the jurisdictional amount.

II.

In providing for a gross premiums tax the Oklahoma constitution does not stipulate a condition precedent to the entry of a foreign insurance company into the state.

III.

The gross premiums tax provided by the Act of 1941 is a general revenue-producing measure imposed under the taxing power of the state and is not a measure adopted in the exercise of its police powers.

IV.

On April 25, 1941, when the 4 per cent gross premiums statute was enacted, petitioner stood admitted to Oklahoma and on a level with all domestic companies of the same type within the state.

V

The gross premiums tax imposed by the Act of 1941 denied to petitioner the equal protection of the laws under the Fourteenth Amendment.

VI.

The gross premiums tax provided by the Act of 1941 was not a condition precedent to the re-entry of petitioner into the state on March 1, 1942.

ARGUMENT**I.**

The United States District Court had jurisdiction of this action.

(a) **The action is not a suit against the State of Oklahoma by a citizen of another state within the meaning of the Eleventh Amendment.**

In its order granting the petition for a writ of certiorari, this Court requested counsel to discuss the right of petitioner to maintain its suit in a Federal court. (R. 48). The opinion of the Circuit Court of Appeals makes no reference to the point (R. 39-46). No point was made

in the defendant's answer that the Federal court did not have jurisdiction of either the person or of the subject-matter (R. 11-13).

The original complaint named the defendant to be "Jess G. Read, Insurance Commissioner for State of Oklahoma" (R. 3), and the summons was directed to "the above named defendant" (R. 10). It is petitioner's contention that the action sought no relief against the State of Oklahoma, and that had judgment gone "against the defendant" as prayed no relief would have been available against the state, and that no machinery of the state would have been set in motion calculated to restore the tax money to petitioner. Rather it would have been left to its remedy against Jess G. Read, whether as Insurance Commissioner or otherwise.

The case of *A. T. & S. F. Railway Company v. O'Connor*, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, seems to be almost identical with the present situation. There action was brought to recover taxes paid under protest, the plaintiff contending that the law under which the tax was levied was unconstitutional. The tax involved was a tax of two cents upon each \$1,000.00 of the plaintiff's capital stock. It was imposed by the laws of Colorado, and plaintiff was a Kansas corporation, the greater part of whose business and property was outside the State of Colorado. After holding that the tax was of the kind previously held by this Court to be unconstitutional, Mr.

Justice Holmes, speaking for a unanimous court, said at page 287:

"The other question is whether the defendant is liable to the suit. The defendant collected the money, and it is alleged that he still has it. He was notified when he received it that plaintiff disputed his right. If he had no right, as he had not, to collect the money, his doing so in the name of the state cannot protect him. *Erskine v. Van Arsdale*, 15 Wall. 75, 21 L. ed. 63. See *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962. It is said that the money, as soon as collected, belonged to the state. Very likely it would have but for the plaintiff's claim, assuming it to remain an identified trust fund; but the plaintiff's claim was paramount to that of the state, and even if the collector of the tax were authorized to appropriate the specific money and to make himself debtor for the amount, it would be inconceivable that the state should attempt to hold him after he had been required to repay the sum. Moreover, it would seem that the statute contemplated the course taken by the plaintiff, and provided against any difficulty in which the Secretary of State otherwise might find himself in case of a disputed tax. For it provides by Sec. 6 that 'if it shall be determined in any action at law or in equity that any corporation has erroneously paid said tax to the Secretary of State,' upon the filing of a certified copy of the judgment the auditor may draw a warrant for the refunding of the tax, and the state treasurer may pay it. We must presume that a judgment in the present action would satisfy the law."

It is submitted that the above case is decisive or comes close to being decisive of the point for which it is cited. It is to be observed that it parallels the case at bar in that the disputed tax was collected by the Secretary of State and it remained in his possession, the tax was paid under protest and suit was brought to recover the amount.

under a statute appearing to be similar to the Oklahoma statute, and pending the suit to recover the tax, the money remained an identified trust fund. And it is to be noted that although in order to refund to plaintiff the protested tax money it was necessary for the State Auditor to draw a warrant upon the State Treasurer and for the treasurer to pay out the funds, yet this Court held that the suit was not against the State of Colorado.

The early decision of *Osborn v. Bank of United States*, 22 U. S. 738, 9 Wheat. 738, 6 L. ed. 204, held that jurisdiction of Federal courts depends upon the parties to the record, and is not to be determined by seeking to ascertain if the state is the real party in interest. The Court concluded that it was proper to enter a decree against individuals who had taken tax money since the state law conflicted with the paramount authority of the Constitution of the United States, for the reason that the statute could furnish no authority to the individual for the taking.

In *U. S. v. Peters* 9 U. S. 115, 5 Cranch 115, 3 L. ed. 53, an action was brought against the state treasurer and the right to maintain the suit was upheld where the money held by the defendant had not been deposited in and commingled with state treasury funds.

Attention is directed to stipulation of fact No. 1 (R. 20), wherein it is agreed that the sum of \$8,189.32 paid by petitioner under protest has been held separate and apart from the general revenue fund of the state treas-

ury of Oklahoma, as provided in Sec. 12665, O. S. 1931, and will not be deposited unless there is a final adjudication in favor of respondent.

Erskine v. Van Arsdale, Collector of Internal Revenue, 82 U. S. 75, 15 Wall. 75, 21 L. ed. 63, settled the right to recover taxes paid under protest to a collecting officer where the taxes were taken without authority of law.

In *Poindexter v. Greenhow, Treasurer*, 114 U. S 270, 29 L. ed. 185, involving the Virginia coupon questions, suit was brought by the taxpayer against the collecting official. The action was one of detinue to obtain a desk taken by the treasurer in default of payment of taxes, although there had been a tender of coupons therefor. One of the stipulations of fact was that defendant was acting in an official capacity. The law purporting to authorize his action being an unconstitutional impairment of contract, the suit was held not to be a suit against the state and it was said that the revenue of the state must yield to the paramount authority of the constitution. The basis of the decision is (page 288) that a defendant who seeks to justify his action by state authority is bound to establish such authority. Although the state is a political corporate body, which can act only through agents, the state officer must produce a law of the state which can serve as his authority as an agent. If the law which he presents is in conflict with the constitution, the constitution must prevail and is, instead, the law of the state. The defendant then stands stripped of his official character.

The present case seems within the exhaustive opinion of this Court in *Ex parte Young*, 209 U. S. 123, 160, 52 L. ed. 714, 729, 28 Sup. Ct. Rep. 441, wherein the foregoing rule is reiterated. This Court points out that both the Eleventh and Fourteenth Amendments to the Constitution exist in full force and must be given equal effect. Under the authority of this opinion and the many decisions following its announced doctrine, it is submitted that Oklahoma has no power to impart to respondent any immunity from responsibility to the supreme authority of the United States.

Illustrative and to the same effect are *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 648, 17 Sup. Ct. Rep. 262, and *Pennoyer v. McConaughy*, 140 U. S. 1, 9, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 699 (the latter being a suit against Land Commissioners of a state).

A state law establishing railroad rates so low as to deprive the carrier of fair compensation violates the Fourteenth Amendment, and a suit to prevent enforcement of such an unconstitutional enactment is not a suit against the state. *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

Where Arkansas laws required a foreign telegraph company to pay a given amount based on all its capital stock merely for filing its articles of incorporation with the Secretary of State, an illegal burden on interstate busi-

ness resulted, as well as a tax on property beyond the jurisdiction of the state. The immunity of the state from suit was not violated by enjoining the Secretary of State from terminating the company's right to do business. *Ludwig v. Western Union Telegraph Company*, 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280, following *Western Union Telegraph Company v. Andrews*, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286.

Petitioner submits that this Court should not base the right to constitutional protection upon a descriptive designation affixed to respondent by the taxpayer; the descriptive phrase cannot alter the unofficial character of respondent's action in collecting the tax and cannot change the effect of the judgment. Respondent is not sued "as" insurance commissioner (R. 3, 11), nor has the tax money been commingled with the general funds of the state. A repayment of the money will not deplete the general funds of the state. It would appear that it was the presence of such factors that led the court to hold the action in *Smith v. Reeves*, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919, to be one against the state.

Respondent has not acted under an admittedly valid statute nor does the suit force him to take any discretionary action. Compare *Ex parte Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164. Respondent has no discretion under the taxing act other than to collect the taxes levied and he has no discretion under Sec. 12665, O. S. 1931, to

do other than hold those taxes pending this judicial determination. The Court in the case at bar is asked neither to assume any of the executive authority of the state nor to supervise any conduct of persons charged with an official duty. It is submitted that this action is not, either in theory or in fact, an action against the State of Oklahoma.

(b) A diversity of citizenship exists and the matter in controversy exceeds the jurisdictional amount.

If this is not a suit against the State of Oklahoma, which petitioner earnestly contends it is not, then it is a suit against Jess G. Read, a citizen of that state. In that case the jurisdiction in the Federal court is apparent.

Paragraph 1 of the complaint (R. 3) alleges:

"Plaintiff is a corporation incorporated under the laws of the State of Wisconsin, but having a permit to do business under the laws of the State of Oklahoma, and defendant is a citizen of the State of Oklahoma. This action arises under the Fourteenth Amendment to the Constitution of the United States, Section 1, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00 (three thousand dollars)."

Numerical paragraph 5 of respondent's answer (R. 11) is as follows:

"5. Defendant admits the allegations contained in paragraph 1 of the complaint."

The jurisdictional statements of the complaint follow the official forms prepared as an appendix to the Federal

Rules of Civil Procedure, 28 U. S. C. A., following Sec. 723(c). The allegations show the existence of a diversity of citizenship and it is unnecessary to specifically allege "that diversity of citizenship exists." *Brown v. Keene*, 33 U. S. 112, 8 Pet. 112, 115, 8 L. ed. 885; *Watters v. Ralston Coal Co.*, 25 Fed. Sup. 387 (D. C., N. D., Penn. 1938).

The action having been brought to recover \$8,189.32, the matter in controversy clearly exceeds the sum of \$3,000.00. Under Sec. 24(1), Judicial Code (28 U. S. C. A., Sec. 41 [1]), the United States District Court had original jurisdiction of this suit of a civil nature because of the existing diversity of citizenship and the presence of the requisite jurisdictional amount.

(c) Even if this were considered to be an action against the State of Oklahoma the state has waived its immunity to suit in respect of the matter here involved, not only in the state courts, but also in the Federal courts.

If this Court rules that this is a suit against the State of Oklahoma, petitioner nevertheless contends that the Federal court has jurisdiction of this cause because the state has waived its immunity to suit in the Federal courts as well as in Oklahoma state courts in respect of the matter here involved, and the action presents a controversy arising under the Constitution of the United States, the amount of which is in excess of the jurisdictional amount. Obviously, if this Court rules that this

is not a suit against the state, the point here made becomes academic.

Section 12665, O. S. 1931 (Appendix IV), provides that in all cases where an illegal tax is involved and the laws provide no appeal, the taxpayer shall pay the full amount at the time and in the manner provided by law, and shall give notice to the collecting officer showing the grounds of complaint, and that suit will be brought. The taxes are held separate and apart, and if summons is served upon the collecting officer for recovery of the taxes within thirty days, he shall hold them until final determination of the suit. The foregoing statute was in force at the time the 4 per cent tax was imposed as of April 25, 1941. As of May 23, 1941, the legislature repealed this statute, but at the same time re-enacted the statute *verbatim* (68 O. S. 1941, Sec. 15.50).

Under the 1941 taxing act complained of, gross premiums taxes on petitioner's 1941 business were due on or before February 28, 1942. They were paid by petitioner on that date, accompanied by a formal protest (R. 7-10), served upon respondent and the State Treasurer. Summons was issued and served within thirty days. There was complete and literal compliance with the statute.

This permissive statute also provides that suits to recover taxes "shall be brought in the court having jurisdiction thereof." It further provides that "they shall have precedence therein," and if it shall be determined that the

taxes were illegally collected "the court shall render judgment showing the correct and legal amount of the taxes due by such person, and shall issue such order in accordance with the court's findings."

While respondent will not deny that this statute waives the state's immunity from suit, yet he no doubt will contend that the above quoted clauses prescribe procedural requirements for Oklahoma courts, but not for Federal courts where the Oklahoma legislature could have no authority. It will thus be asserted that the Oklahoma legislature did not intend to authorize the filing of actions in Federal courts.

This issue was resolved to the contrary almost fifty years ago by the memorable opinion in *Reagan v. Farmers' Loan and Trust Company*, 154 U. S. 362, 391, 392, 38 L. ed 1014, 1021, 14 Sup. Ct. Rep. 1047, 42 Inters. Com. Rep. 560, decided May 26, 1894, by a unanimous court. The Texas legislature had created the Texas Railroad Commission. Section 6 of the statute (for the purpose of immediate comparison with the Oklahoma statute) was as follows:

"Sec. 6. If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge, classification or order, or to either or all of them, in a court of competent jurisdiction in Travis County, Texas, against said com-

mission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court, at either of its terms, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending: Provided, That if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice" (Italics supplied).

It was asserted that the provision that suits could be brought "in a court of competent jurisdiction in Travis County, Texas," excluded jurisdiction of Federal courts sitting in Travis County. The court said (page 392):

"• • • The language of this provision is significant. It does not name the court in which the suit may be brought. It is not a court of Travis County, but in Travis County. The language, differing from that which ordinarily would be used to describe a court of the state, was selected, apparently, in order to avoid the objection of an attempt to prevent the jurisdiction of the Federal courts."

It may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of the state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own

courts. *Reagan v. Farmers' Loan and Trust Company*, *supra*; *Smyth v. Ames*, 169 U. S. 445, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418.

In the Reagan case this Court held not only that the language employed in the statute did not restrict the consent of the state to suit in its own courts, but also that irrespective of such consent, the suit was not in effect a suit against the state (although the attorney general was enjoined), and, therefore, not prohibited under the Eleventh Amendment (page 392). The conclusion of the court was that the objection to the jurisdiction of the Federal court was not tenable, whether that jurisdiction was rested (page 393) "upon the provisions of the statute, or upon the general jurisdiction of the court existing by virtue of the statutes of Congress, under the sanction of the Constitution of the United States." Each of these grounds is effective and both are of equal force. *Union P. R. Co. v. Mason City and Ft. D. R. Co.*, 199 U. S. 160, 166, 50 L. ed. 134, 137, 26 Sup. Ct. Rep. 19.

The Oklahoma statute does not require that the suit be brought in any particular court or in any particular locality, but merely that it be brought "in the court having jurisdiction thereof." The remaining statutory provisions, when compared with the restrictive clauses of Section 6 of the Texas statute construed in the Reagan case, show that this action is authorized in any Federal court otherwise having jurisdiction. It is contended,

therefore, that the state's waiver of immunity extends to the suit at bar.

(d) This is a suit of a civil nature which arises under the constitution of the United States and in which the matter in controversy exceeds the jurisdictional amount.

The Federal courts have jurisdiction of actions arising under the constitution irrespective of the citizenship of the parties litigant. 28 U. S. C. A., Sec. 41 (1). If the state is amenable to suit in the Federal court with respect to the matter here involved, that court may decide the controversy if it arises under the United States Constitution.

The complaint and the formal protest attached as an exhibit demonstrate that petitioner's right to the equal protection of the laws is an essential element of its cause of action. A genuine and present controversy exists as is shown from the face of the complaint, without anticipation of any claim or defense which might be alleged by the opposing party. Protection of the Fourteenth Amendment is invoked upon the ground that the tax was imposed upon petitioner after it had complied with all prerequisites to becoming a quasi citizen of the State of Oklahoma and at a time when it stood upon a level with directly competing domestic companies. The complaint asserts the imposition of a grossly discriminatory tax burden threatening deprivation of a unique type of business built up through a period of twenty years, and demon-

strates that the legislative enactment was an unauthorized exercise of the state's taxing power rather than a legitimate employment of the usual police powers resting in a sovereign state—powers primarily exerted for the protection of those citizens of the state who may deal with foreign companies.

This Court has settled the right to proceed in the Federal courts where cases arise under the Constitution through a long, unvarying line of opinions. In *Nashville v. Cooper*, 73 U. S. 247, 6 Wall. 247, 18 L. ed. 851, the court proclaimed the right and duty of the national government to have its constitution and laws interpreted and applied by its own judicial tribunals.

This Court's opinion in *Village of Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, holds that under a state statute authorizing injunctions and under general principles as well, a Federal court has jurisdiction to enjoin the collection of taxes on private property being taken under the power of eminent domain for the reason that the taxing act violates due process and the case thus "arises under the Constitution of the United States."

In *Raymond, County Treasurer, v. Chicago Union Traction Company*, 207 U. S. 20, 52 L. ed. 78, 28 Sup. St. Rep. 7, the claim that the collection of a tax would violate the constitution was held to constitute a Federal question within the original jurisdiction of a Federal court. And in *Greene v. Louisville & I. R. Company*, 244 U. S. 499, 61

L. ed. 1280, 37 Sup Ct. Rep. 673, a state board of valuation and assessment, and its members individually, were enjoined from enforcing certain franchise taxes assertedly denying to plaintiff equal protection and due process. It was held both that the complaint presented a controversy arising under the Constitution of the United States and that the suit was not against the state within the meaning of the Eleventh Amendment.

A suit to enjoin the collection of special excise taxes imposed by a state statute upon railroads, which taxes are alleged to violate the due process clause and to burden interstate commerce is a "suit of a civil nature which arises under the Constitution of the United States." *Davis v. Wallace*, 257 U. S. 478, 66 L. ed. 325 42 Sup. Ct. Rep. 164.

The principle was followed and applied in *Keokuk & Hamilton Bridge Co. v. Salm*, 258 U. S. 122, 66 L. ed. 496, 42 Sup. Ct. Rep. 207, where the complaint alleged that the taxation involved was based upon discriminatory overvaluation of property, thereby denying equal protection and depriving plaintiff of property without due process. Although jurisdiction of the district court was confirmed, injunctive relief was denied because of the existence of an adequate remedy at law.

Mr. Justice Stone's opinion in *Risty v. Chicago, R. I. & P. R. Co.*, 270 U. S. 378, 70 L. ed. 641, 46 Sup. Ct. Rep. 236, concluded that a contention that an assessment of

taxes upon lands beyond the taxing district deny to the owner due process and equal protection gives this Court jurisdiction.

Jurisdiction was upheld in *Hopkins v. Southern California Telephone Company*, 275 U. S. 393, 72 L. ed. 329, 48 Sup. Ct. Rep. 180, where an unconstitutionally discriminatory tax on leased telephones was involved.

Not all of the cases involving unconstitutional imposition of taxes have been of an equitable nature. In *Patton v. Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493, this Court held that the case arose under the constitution where plaintiff had brought an action against the Collector of Internal Revenue to recover excise taxes on tobacco, previously paid under protest, and alleged that the act of Congress levying the taxes was unconstitutional.

Illinois Central Railway Company v. Adams, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 251, illustrates application of the jurisdictional test to cases asserting the impairment of contract obligations. The railroad had been exempt from taxes for a period of twenty years under the terms of its charter. It sought to enjoin the Railroad Commission of Mississippi from approving and certifying tax assessments. Since the complaint alleged an impairment of a contract obligation and the claim was apparently being made in good faith, it was held that the case arose under the constitution. The court further determined that the Eleventh Amendment was no bar to the right to proceed in the Federal court.

And in *Jetton v. University of the South*, 208 U. S. 489, 52 L. ed. 584, 28 Sup. Ct. Rep. 375, where an injunction was sought against the collection of taxes on the ground of a contract exemption therefrom, this Court decided that, while there was actually no unconstitutional impairment, the averments of the bill were sufficient to establish jurisdiction of the Federal court.

Impairment of the contract clause of the constitution by municipal action involves the construction and application of the constitution, and such rights being asserted, the Federal courts have jurisdiction. *Pacific Electric Railway v. Los Angeles*, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586; *City Railway Company v. Citizens' Street Railway Company*, 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653.

A remedy by injunction has been afforded by the Federal courts in numerous cases involving rates. See *Home Telephone and Telegraph Company v. Los Angeles*, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312. Upholding an injunction against the enforcement of a municipal ordinance setting telephone rates, the court pointed out that the provisions of the Fourteenth Amendment are generic in their terms and are addressed not only to the states, but as well to every person who is the repository of state power. Also, *Siler v. Louisville & N. R. Co.*, 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451, where the Kentucky Railroad Commission was enjoined, and *Columbus Railway, Power and Light Co. v. Columbus*, 249 U. S.

399, 63 L. ed. 669, 39 Sup. Ct. Rep. 349, enjoining a city council.

Swafford v. Templeton, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783, and *Wiley v. Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17, established jurisdiction on the ground that the cases arose under the constitution. There the actions were to recover damages for refusal of the plaintiff's vote or right to vote. It was contended, as does the respondent herein, that jurisdiction was lacking because the case did not involve the "construction or application of the constitution." Defendants asserted that, since the constitution did not specifically confer the right of suffrage, there was no problem of interpretation, construction or application of the provisions of our constitution. But this Court held that the actions sought vindication or protection of the right to vote, and that such right was in the very nature of things one arising under the constitution.

In the present case, respondent has invaded petitioner's constitutional guaranty of equal protection. Only the Constitution of the United States extends to petitioner this inviolate right, and without its protection petitioner would have neither cause of action nor remedy against an extreme disparity and discrimination in taxation.

Attention is directed to *Fidelity and Deposit Company v. Tafoya*, 270 U. S. 426, 70 L. ed. 664, 46 Sup. Ct. Rep. 331. There the New Mexico Corporation Commis-

sion attempted to exclude a foreign corporation from the state for violation of a statute demanding that insurance brokerage fees be paid only to New Mexico agents. This Court affirmed federal jurisdiction to enjoin the deprivation of constitutional rights.

A case may arise under the Constitution of the United States, vesting jurisdiction in the Federal court under the Judicial Code, though equitable relief may be still denied upon the ground that there is an adequate remedy at law. Such a remedy at law is available both in the state courts and in the Federal courts, since the courts of the United States would otherwise have jurisdiction. *Matthews v. Rodgers*, 284 U. S. 521, 76 L. ed. 447, 52 Sup. Ct. Rep. 217.

Perhaps the most elaborate opinion of this Court upon the jurisdiction of the courts of the United States in cases arising under the constitution, is *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. Rep. 441. There, as here, it was insisted that there was no federal question presented under the Fourteenth Amendment because there could be no dispute as to the meaning of the constitution in those clauses providing that no state shall deprive life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; that whatever dispute there might have been in the case was simply one of fact as to whether the freight or passenger rates, as fixed by the legislature or by the

railroad commission, were so low as to be confiscatory. It was decided that if such legislative acts and commission orders would take property without due process if enforced, then a federal question was presented, although a question of fact would be thereby presented.

Other cases in which Federal jurisdiction was upheld on the foregoing ground are the following:

City of Mitchell v. Dakota Central Telephone,
246 U. S. 396, 62 L. ed. 793, 38 Sup. Ct. Rep. 362;

Mayo v. Lakeland Highlands Canning Co.,
309 U. S. 310, 84 L. ed. 774, 60 Sup. Ct. Rep. 517;

Smith v. Kansas City Title and Trust Company,
255 U. S. 180, 65 L. ed. 577, 41 Sup. Ct. Rep. 243;

Clallam County v. United States,
263 U. S. 341, 68 L. ed. 328, 44 Sup. Ct. Rep. 121;

Herkness v. Irion,
278 U. S. 92, 73 L. ed. 198, 49 Sup. Ct. Rep. 40;

Central Kentucky Natural Gas Company v. Railroad Commission,
290 U. S. 264, 78 L. ed. 307, 54 Sup. Ct. Rep. 154.

Compare *Coulter v. Louisville & N. R. Co.*, 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342, where it appears that this Court first determined that inequality in taxation may not be so systematic and intentional as to violate equal protection as applied to a domestic company, and, therefore, that jurisdiction may be lacking despite the allegations in the bill.

The question on the merits presented by the complaint herein is whether a state has power under the Constitution of the United States to levy a discriminatory tax for revenue purposes after petitioner's admission to the state.

The state's power in this regard must be limited, if at all, by the equal protection clause; and the restriction thereby placed upon the state's power can only be determined from the decisions of this Court. It is submitted, therefore, that this case arises under the constitution and that the district court had jurisdiction, irrespective of the citizenship of the parties.

II.

In providing for a gross premiums tax the Oklahoma Constitution does not stipulate a condition precedent to the entry of a foreign insurance company into the state.

Secs. 1, 2 and 3 of Art. XIX of the Constitution of Oklahoma, read as follows:

"1. Foreign Insurance Companies—Conditions of Doing Business.

"No foreign insurance company shall be granted a license or permitted to do business in this state until it shall have complied with the laws of the state, including the deposit of such collateral or indemnity for the protection of its patrons within this state as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license.

"2. Entrance Fees—Annual Tax.

"Until otherwise provided by law, all foreign insurance companies, including surety and bond companies, doing business in the state, except fraternal insurance companies, shall pay to the Insurance Commissioner for the use of the state, an entrance fee as follows:

"Each foreign life insurance company, per annum, two hundred dollars; each foreign fire insurance company, per annum, one hundred dollars; each foreign accident and health insurance company, jointly, per annum, one hundred dollars; each surety and bond company, per annum, one hundred and fifty dollars; each plate glass insurance company (not accident), per annum, twenty-five dollars; each foreign livestock insurance company, per annum, twenty-five dollars.

"Until otherwise provided by law, domestic companies excepted, each insurance company, including surety and bond companies, doing business in this state, shall pay an annual tax of two per centum on all premiums collected in the state, after all cancellations are deducted, and a tax of three dollars on each local agent.

"3. Non-Profit Insurance Organizations.

"The revenue and tax provisions of this constitution shall not include, but the state shall provide for, the following classes of insurance organizations not conducted for profit, and insuring only their own members:

"First, farm companies insuring farm property and products thereon; second, trades insurance companies insuring the property and interest of one line of business; third, fraternal life, health and accident insurance in fraternal and civic orders, and in all of which the interests of the members of each respectively shall be uniform and mutual."

Taken by and large, the above three sections of the Oklahoma Constitution purport on their face to deal with, first, the admission into the state of foreign insurance companies, and, second, to taxes to be imposed upon those companies after their admission. It remains to distinguish between these two features of the sections in question.

It seems fair to observe that Section 1, and the first two paragraphs of Section 2 purport to deal with the admission of foreign companies into the state, whereas the third paragraph of Section 2 relates to taxes to be imposed upon these companies after admission and while "doing business" in the state. Section 3 provides that the "revenue and tax provisions" of the constitution shall not apply to insurance organizations not conducted for profit and insuring only their own members, such as insurance of farm property, fraternal insurance, etc. Having just prescribed a tax of 2 per cent on foreign insurance companies, Section 3 follows and consistently refers to the 2 per cent tax provision as one of the "revenue and tax provisions" of the constitution. The third paragraph of Section 2 drives the tax nail and Section 3 proceeds to clinch the point.

As conditions of admission to the state, Section 1 requires the applying foreign company to show that it has complied with the laws of the state with respect to foreign insurance companies, to deposit such collateral for the protection of its patrons within the state as may be prescribed by law and to agree to pay all such taxes and fees as may at any time be imposed by law on foreign insurance companies. In addition to these conditions of admission the first two paragraphs of Section 2 provide that applying foreign insurance companies shall pay to the Insurance Commissioner for the use of the state "an entrance fee," which in the case of life insurance companies is stated to

be \$200.00 and in the case of accident and health insurance companies the sum of \$100.00, or a total of \$300.00 for a foreign company engaged as is petitioner, in the business of life, accident and health insurance. The foregoing are in character true conditions precedent to admission to the state. Up to this point a clear statement is found of the requirements which must be met by a foreign company desiring admission. On the face of the language used, a company meeting these requirements will receive a license authorizing it to do business in the state.

Having disposed of these conditions, including the "entrance fee," to the issuance of a license, the third paragraph of Section 2 passes to the question of the tax burden which the foreign corporation "doing business" in the state shall be required to assume after admission. This tax burden is stated to be "an annual tax of two per centum on all premiums collected in the state, * * * and a tax of three dollars on each local agent." Obviously, this annual tax cannot be paid before the foreign company is admitted into the state and its payment cannot be a condition precedent to admission to the state. It necessarily is an item which can only be paid after the calendar year in which the company entered the state has ended. Only at the end of this calendar year will the foreign company be able to ascertain the amount of premiums collected in the state during the year of admission and then to compute the amount of the annual tax required to be paid.

Collection of this tax at the end of the year may be both a convenient and a logical method of collection, but the method of imposition and collection labels the imposition as a tax dissociated with the admission of the taxpayer into the state. The procedure is to admit the foreign company and then to tax it. If that law provided that a foreign company desiring admission or re-admission into the state should pay as a condition of entrance 2 per cent of the premiums received in the preceding calendar year in the state (as do the laws of some states—see 1943 Illinois Revised Statutes, Ch. 73, Sections 1021-1025), a different situation would be presented. But that is not the procedure in Oklahoma since admittedly the premiums tax is not paid prior to or at the time of admission. Petitioner submits that no construction of the language used in the Oklahoma constitution or of any enactment in accordance therewith, holding payment of this tax to be a condition precedent to admission when it is not due or payable until one year after admission, is possible without doing violence to the usual rules of construction applicable in such cases.

III.

The gross premiums tax provided by the Act of 1941 is a general revenue-producing measure imposed under the taxing power of the state and it is not a measure adopted in the exercise of its police powers.

It is the contention of petitioner that the enactment of the Oklahoma legislature of April 25, 1941, was, and is, a taxing measure calculated to raise revenue for state purposes in the usual manner of revenue-producing measures. Agreeable to the introductory clause of the third paragraph of Section 2 which provides that the 2 percent tax shall exist "until otherwise provided by law" the legislature proceeded to the enactment of April, 1941 (Appendix II). While, with this thread of kinship, the legislative act may be traced to the constitution, yet the act itself seems to go as far as possible to divorce itself from this relationship. The act bristles with indicia of the customary revenue-producing measure. It proclaims almost vehemently that its purpose is to raise revenue for general state purposes. It evidences no intent to bottom the measure upon an exercise of the police powers of the state.

In the title it is stated that the act is one "providing for an annual tax of four per cent (4%) on all premiums collected in this state * * * to be paid by all foreign insurance companies doing business in the State of Oklahoma." The act extends the provisions of the statute to include "every foreign corporation, * * * who is a non-resident of the State of Oklahoma, doing an insurance business of any nature whatsoever." The act provides for the "distribution and appropriation of such taxes." An emergency is declared.

The title to the act in no manner refers to an "entrance fee" or otherwise indicates that it is calculated to prescribe one or more conditions precedent to be met by foreign insurance companies desiring to enter the state. Only a gross premiums tax is indicated by the title and it is fair to say that by reading the title of this act no one could discover or would surmise that it had any relation to or bearing upon the question of the entry into the state of a foreign insurance company.

The procedure specified in this act and the taxing provisions found in the body of the act, characterize it as anything but legislation dealing with conditions precedent to entry into the state. It requires every foreign insurance company "doing business in the State of Oklahoma" to make an annual report on or before the last day of February, under oath of the president or secretary or other chief officer, to the Insurance Commissioner, which report shall show the total amount of gross premiums received in the state within the calendar year next preceding the first of January. This provision is inconsistent with legislation calculated to refer to foreign insurance companies desiring to enter the state. On the contrary, it assumes that the companies who are to make this report are those already in the state and those who, as the act states, are "doing business" in the state.

At the time this report is made the act requires the foreign company to pay to the Insurance Commissioner

"an entrance fee" as provided by the constitution "and an annual tax of four per cent (4%) on all premiums collected" in the state "in addition to an annual tax of three dollars (\$3.00) on each agent." The law thus segregates the entrance fee from the tax levied.

The act further provides that any company failing to make these returns and to pay promptly the items required "shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars (\$500.00)." It further provides that the company failing or neglecting for sixty days to make the report and pay the taxes shall "be debarred from transacting any business of insurance in this state until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this state."

To be consistent in its taxing nature, the act then proceeds to provide that the Insurance Commissioner shall disburse the taxes collected by him under the act so that 50 per cent of the tax on all fire insurance company premiums shall be allocated for the Firemens' Relief and Pension Fund and the remainder of the 4 per cent tax shall be paid to the State Treasury to the credit of the general fund of the state.

The mere statement of the foregoing provisions seems persuasive of the proposition that the legislation is re-

moved from the category of legislation calculated to govern the admission of the foreign company into the state.

The title of this 1941 act states that it is an act amending Section 10478, which was the prior act by which the 2 per cent tax was provided in much the same manner. The Oklahoma Supreme Court has not yet determined whether or not the premiums tax in question is an entrance fee levied under the state's police power. However, that court was called upon to decide whether the provision "shall be in lieu of all other taxes and fees" found in both acts, exempted foreign companies from the payment of ad valorem taxes. *New York Life Insurance Company v. Board of Commissioners of Oklahoma County*, 155 Okla. 247, 9 Pac. (2d) 936. Constitutionality of the 2% gross-premiums tax was not involved in that case. There was no interpretation of the statute for the purpose of deciding if the tax is an additional entrance fee, and the court did not determine whether the tax had any of the characteristics of a condition precedent. The Oklahoma court decided that the 2 per cent tax was an excise or privilege tax and that the "in lieu" provision meant that such tax is to be paid "in lieu of all other (excise) taxes."

While a Federal court is bound by the denomination of the tax placed thereon by the highest court of the state, yet it is not bound by any characterization thereof insofar as that characterization may bear upon the question of the effect of the tax under the Federal Constitution. *Hanover*

Fire Insurance Company v. Harding (Hanover Fire Insurance Company v. Carr), 272 U. S. 494, 71 L. ed. 372, 47 Sup. Ct. Rep. 179, 49 A. L. R. 713.

IV.

On April 25, 1941, when the 4 per cent gross premiums statute was enacted, petitioner stood admitted to Oklahoma and on a level with all domestic companies of the same type within the state.

Petitioner had received on or prior to March 1, 1941, its license to transact business in the state for a period to end March 1, 1942. Prior to the issuance of this license, it had paid the "entrance fee" of \$300.00 and had paid 2 per cent of the gross premiums received by it in the state during the calendar year 1940. Thus, petitioner was fully domesticated in the state, at least for the license year beginning March 1, 1941. It was a "person" within the jurisdiction of the State of Oklahoma (R. 4, 11-12). It was a quasi citizen of the state. It stood on a level plane with domestic corporations of the same kind and was entitled to privileges equal to those due to other similar citizens of the state. *Hanover Fire Insurance Company v. Harding, supra.*

Notwithstanding this status in the state which petitioner had paid for and was entitled to enjoy, the Oklahoma legislature in less than two months after that status had been acquired, enacted the 4 per cent tax complained of, which became effective as an emergency enactment on

April 25, 1941. By its terms, a tax levy of 4 per cent was laid upon the gross premiums which petitioner had theretofore received within the state since the first of that year and which it would receive within the state up to the end of that year. The act was rigidly directed at gross premiums for 1941 as well as for subsequent years. The Insurance Commissioner considered it a levy on 1941 premiums, and rightly so (R. 21). Petitioner submits that this enactment of 1941 denied to it equal protection of the laws to which it was entitled under the Fourteenth Amendment.

V.

The gross premiums tax imposed by the Act of 1941 denied to petitioner the equal protection of the laws under the Fourteenth Amendment.

It is fundamental that a sovereign state has the constitutional power to close its boundaries to all foreign insurance corporations if it so desires and that such exclusion may be for an entirely arbitrary reason. If, however, it desires to admit them it may, in the exercise of its police power, impose certain conditions upon the privilege thus granted, the only limitation upon such conditions being that they may not include or require a waiver or surrender of rights secured to foreign corporations by the Constitution of the United States.

In requiring the deposit of collateral or indemnity for the protection of insurance patrons within the state as a prerequisite to the issuance of a license, Sec. 1 of Art. XIX of the Oklahoma Constitution, appears to be a legitimate exercise of the state's police power. Its object is to guard those Oklahoma residents who may purchase policies of insurance from foreign companies and to assure the payment of their subsequent claims. Since they are not dealing with locally established concerns, this is a matter which is important to the welfare of the people of the state. But exercise of the police power is the raising of a shield for the policyholders and it may not be exercised as an excuse for economic discrimination between domestic companies and foreign companies providing the same services and doing an identical type of business. The "taxes or fees" which petitioner was required by the Oklahoma Constitution to "agree to pay" on pain of suffering a "forfeiture" of its license, must be considered as limited to those taxes or fees which are not repugnant to the Constitution of the United States. *Hanover Fire Insurance Company v. Harding* (Hanover Fire Insurance Company v. Carr), 272 U. S. 494, 71 L. ed. 372, 47 Sup. Ct. Rep. 179, 49 A. L. R. 713, and cases therein cited. *Connecticut General Life Insurance Company v. Johnson*, 303 U. S. 77, 79, 80, 82 L. ed. 673, 677, 58 Sup. Ct. Rep. 436.

It is conceded that if the 4 per cent tax law were a measure adopted in exercise of the state's power to police

its borders and if it set up machinery for taking a toll at those borders from those desiring to cross, then that law would stand the test of constitutionality. But it is submitted that the law in question is not that kind of law.

Whether the tax be designated as a "privilege tax," a "franchise tax," an "occupation tax" or some other kind of tax is of no moment in determining whether it is a payment required under the police power of the state as a condition of entry into the state. Rather, the important inquiry is to be directed to the time when the tax is to be paid with relation to the entry of the foreign company into the state. As was said by Mr. Justice Brandeis in *Atlantic Refining Co. v. Virginia*, 302 U. S. 22, 32, 82 L. ed. 24, 31, 58 Sup. Ct. Rep. 75, "The exaction, although called in some of those cases a filing fee, was in each case strictly a tax; for it was imposed after the admittance of the corporation into the state."

Certainly no form of compliance with the 1941 act was a condition upon which petitioner was "admitted" to do business in 1941, even assuming that a foreign insurance company possessed of a valuable and irreplaceable business built up through a period of twenty years, is theoretically "within the state" only from year to year. In *Hanover Fire Insurance Company v. Harding* (*Hanover Fire Insurance Company v. Carr*), 272 U. S. 494, 509, 71 L. ed 372, 380, 47 Sup. Ct. Rep. 179, Mr. Chief Justice Taft, speaking for the entire court, said:

" * * * In the Greene case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same that *pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens*"

And at page 515:

" * * * the decision in *Southern R. Company v. Greene*, 216 U. S. 406, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247, shows that this power to change the tax imposed on a foreign corporation as a condition for the license of continuing business is not unlimited, and that any attempt in a renewal to vary the terms of the *original* license which, however indirectly, enforces a new condition upon the corporation and involves a deprivation of its federal constitutional rights, can not be effective" (Italics supplied).

It was necessary to determine that the Illinois net receipts tax involved in the foregoing controlling opinion was not a condition precedent. This Court did not attempt to justify the tax upon the basis that, as a privilege tax, its payment may either precede or follow exercise of the privilege. The opinion negatives such a nebulous rationalization.

Prior to the Hanover decision, the Illinois Supreme Court had held that the Illinois net receipts tax was a tax on the business of insurance and that it was not a tax on personal property, which was subject to debasement. *People ex rel. City of Chicago v. Barrett*, 309 Ill. 53, 139 N. E. 903. Then the Illinois court ruled that, regardless of what it might be called, the net receipts tax was a tax

on the right to continue to do business in the state, and that it did not deny equal protection of the laws under the Fourteenth Amendment. The court remarked that this tax on the business of insurance was not to be distinguished from a privilege tax and the fact that a tax is a privilege tax does not necessarily require it to be paid as a condition precedent to entering the state. *Hanover Fire Insurance Company v. Carr*, 317 Ill. 366, 148 N. E. 23. Upon writ of error to review this decree, this Court held that compliance with the net receipts taxing act was not a condition precedent to permission to do business in Illinois and was, therefore, an unconstitutional exercise of the state's taxing power. This Court demonstrated the impossibility of converting the tax to a condition precedent since it was necessary for the company to engage in business in the state prior to the time of payment of the tax; otherwise it would be impossible to compute the tax (page 512).

The opinion below, *Great Northern Life Insurance Company v. Read*, 136 Fed. (2d) 44, 47, seems predicated upon a determination that while petitioner was licensed from March 1, 1941, to February 28, 1942, yet it was within the power of the state to change the "condition of admission" as to the succeeding license year. At the same time, the court concedes that the tax is not imposed upon the future license year, but upon business done during the expiring license year. This confesses that petitioner had

been admitted to Oklahoma and placed upon an equal basis with competing domestic corporations, not only prior to the time for payment of the tax, but actually before the tax was levied.

Respondent may rely upon *Carpenter v. People's Mutual Life Insurance Company*, 10 Cal. (2d) 299, 74 Pac. (2d) 508, and *Pacific Mutual Life Ins. Co. v. Hobbs*, 152 Kan. 230, 103 Pac. (2d) 854, for the contention that payment may either precede or follow the exercise of the privilege, depending upon which system the legislature chooses to adopt. In the former of these cases, the company was not doing business in the state when the tax accrued because of a previous court order for liquidation. To hold it liable for payment of the tax, the California court was required to determine that the tax was paid for the previous year and not for the future or ensuing license year; the court did not hold that the tax was a condition precedent to a license renewal for the ensuing year since the company was not seeking to renew its license. In the Kansas case, the court recognized that the tax was not a prospective privilege tax, but was paid for the preceding year by saying that "to hold otherwise would permit a foreign company coming into the state for the first time to be exempt from taxation on the business done in the first year, if it withdrew at the end of the first year." Petitioner agrees that the tax paid at the end of the 1941 license year was a tax upon its 1941 business. Had petitioner withdrawn from the state at that time it still would

have been liable for the tax; since the doubled assessment was not a condition precedent to a license renewal for 1942.

The 4 per cent tax was directed only at foreign companies and did not apply to domestic companies doing a business identical to that being done by petitioner and with whom petitioner stood on a par at the time of the enactment. Petitioner contends that the levy on its premiums is arbitrary and discriminatory and that the act denies to petitioner equal protection of the laws. The power to tax in the usual sense is limited by the requirements of uniformity upon the same class of subjects and the demands of the equal protection clause.

It was stipulated that from November 16, 1907 (prior to the effective date of the 1909 General Insurance Act of Oklahoma, Chapter 21, O. S. L. 1909), to December 31, 1941, the Oklahoma Insurance Department received \$25,585,107.34, almost all of which was derived from the 2 per cent tax on gross premiums. Departmental expenses aggregated \$910,107.34; they were approximately 3.55 per cent of the total receipts (R. 20). Since doubling of the tax, those departmental expenses are approximately 2 per cent of the gross receipts. In other words, the cost of regulating and policing foreign companies for the benefit of Oklahoma citizens and policyholders is so disproportionate to the amount collected that the tax is obviously one for revenue purposes.

Validity of a tax must be tested by applicable constitutional requirements of reasonable classification if discrimination is permitted. By whatever name the tax may be called, it unconstitutionally discriminates against foreign insurance companies firmly establish in Oklahoma.

Following the decision of this Court in the Hanover case, the Illinois court once again returned to its original view that the tax therein involved was a property tax and if debased as was other property, would be constitutional. In *Concordia Fire Insurance Company v. Illinois*, 292 U. S. 535, 545, 78 L. ed. 1411, 1418, 54 Sup. Ct. Rep. 830, this Court pointed out that it is completely immaterial what the tax may be called, saying:

" * * * No reasonable basis for such a discrimination is suggested and none is perceived. It is essentially the same character of arbitrary and prejudicial discrimination that was condemned as a denial of the equal protection of the laws in *Hanover Fire Insurance Co. v. Harding* (*Hanover F. Ins. Co. v. Carr*), 272 U. S. 494, 71 L. ed. 372, 47 Sup. Ct. Rep. 179, 49 A. L. R. 713."

However, the record in the Concordia case showed that domestic corporations were subject to some taxes not laid upon foreign corporations; and plaintiff failed to show that such taxes were not the substantial equivalent of the net receipts tax. Recovery was denied by reason of the failure of proof.

There was no such failure in the present case. Stipulation of fact No. 2 (R. 20) is as follows:

"That domestic life, health and accident insurance companies competing in Oklahoma with plaintiff do not pay any kind or type of taxes to said state which are not likewise paid by plaintiff, except that said competing domestic insurance companies pay an annual income tax, from which tax plaintiff is exempt, the amount of which tax, however, is approximately 1/20th of the amount of 4 per cent tax would bring on the premiums collected by said companies in this state, less proper deductions."

The record discloses that the only tax not applied to foreign corporations, but paid by domestic corporations, is not the substantial equivalent of the gross premiums tax. Certainly, mathematical equivalence is neither required nor obtainable; nor is identity in mere modes of taxation of importance where there is substantial equality in the resulting burdens. Here there is an enormous disparity in the relative burdens shouldered by domestic and foreign insurance companies.

Tax laws made to apply after a foreign corporation has been received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the Fourteenth Amendment. *Hanover Fire Insurance Company v. Harding, supra.*

When a foreign corporation has entered a taxing state in compliance with its laws and acquired therein property of a fixed and permanent nature upon which it has paid all taxes levied by the state, it is not liable for a new and additional franchise tax for the privilege of doing

business within the state if that tax is not imposed upon competing domestic corporations. *Southern Railway Company v. Greene*, 216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep. 287. To the same effect is *St. Louis Cotton Compress Company v. Arkansas*, 260 U. S. 346, 348, 67 L. ed. 297, 298, 43 Sup. Ct. Rep. 125.

Doubling the annual license fee paid by foreign corporations in Oklahoma, when an increase in tax payment is not required of competing domestic corporations, has been held in contravention of the Fourteenth Amendment. *Sneed v. Shaffer Oil & Refining Company*, 35 Fed. (2d) 21. Oklahoma has not provided for an entrance or admission fee, but has levied a tax. It has not attempted to make any classification between corporations doing different types of business for the purpose of imposing a different rate of taxation upon foreign insurance companies; in fact, all foreign companies are required to pay the tax while domestic companies pay none whatever. Nor are domestic companies required to share a substantial portion of the tax burden by the imposition of other and different taxes. The one taxpayer class is composed of foreign companies; the exempted class is made up of domestic companies.

A classification for tax purposes, in order to avoid violation of the equal protection clause, must be based upon a real and substantial distinction bearing a reasonable and just relation to the purpose to be accomplished.

- Air-Way Electric Appliance Corporation v. Day*,
266 U. S. 71, 69 L. ed. 169, 45 Sup. Ct. Rep. 12;
Southern Railway Company v. Greene,
216 U. S. 400, 54 L. ed. 536, 30 Sup. Ct. Rep.
287;
Royster Guano Company v. Virginia,
253 U. S. 412, 64 L. ed. 989, 40 Sup. Ct. Rep.
560;
Hopkins v. Southern California Telephone Co.,
275 U. S. 393, 72 L. ed. 329, 48 Sup. Ct. Rep.
180;
Quaker City Cab Company v. Pennsylvania,
277 U. S. 389, 72 L. ed. 927, 48 Sup. Ct. Rep.
553;
Iowa-Des Moines National Bank v. Bennett,
284 U. S. 239, 76 L. ed. 265, 52 Sup. Ct. Rep.
133.

Since the gross premiums tax involved herein cannot be upheld as an exercise of the police power and since there is no attempt at reasonable classification to support it as an exertion of the state's power to tax, it must be held to be in violation of the equal protection clause of the Constitution.

VI.

The gross premiums tax provided by the Act of 1941 was not a condition precedent to the re-entry of petitioner into the state on March 1, 1942.

In accordance with the statute applicable on or prior to February 28, 1941, petitioner, desiring to continue business in the State of Oklahoma, filed the annual statements

required by law (Appendix III). At the same time petitioner paid the fee of \$300.00, being the aggregate amount demanded by respondent as the "entrance fee" for renewal of its license. As we have seen, the Insurance Commissioner, as a matter of administrative practice, has at all times considered that the 2 per cent tax was a tax paid by a foreign insurance company for the privilege of having done business during the expiring license year and that payment must be shown prior to a renewal. Agreeable to this interpretation, the Commissioner demanded that in addition to payment of the entrance fee petitioner should also pay 4 per cent of the premiums received by it in the state for the calendar year 1941, and thus, no doubt, in addition to following the administrative practice, the Commissioner also had in mind that by requiring petitioner to pay this premiums tax he was also seeing to it that petitioner met the requirements of Section 1 of the Constitution and paid taxes "imposed by law or act of the legislature on foreign insurance companies." This tax payment was made under protest. Every prerequisite having been complied with by the petitioner, although the tax payment was made under protest, the Commissioner issued the license as of March 1, 1942. Although petitioner's tax burden had been doubled after its admission in 1941, it is reasonable to assert that in view of the property which over a period of upwards of twenty years it had laboriously built up in the state, it saw fit to pay under protest and to take out a further license on March 1, 1942.

For the sake of argument only, petitioner admits that it is "within the State of Oklahoma" only from year to year. This is a great sacrifice of substance to form. It embraces a very technical and highly artificial theory contrary in every respect to realistic fact. Petitioner has actually done business in Oklahoma for more than twenty years; through those years it has secured renewals of its license and built up a large goodwill in the State of Oklahoma, associating with it numerous agents in the various counties of the state, whose connection with it have resulted in a large and profitable business to petitioner. Its records of information concerning its policyholders, the character and nature of their policies and other invaluable assets are irreplaceable. They are not subject to sale or lease, and the value of all would be destroyed if Oklahoma were permitted to exclude petitioner from the state by a denial of the equal protection of the laws. Thus to portray the company as a traveler crossing and re-crossing the state's boundary at the expiration of each twelve months is the height of legal fantasy.

Assuming that such were the fact, and that the visited state could at any time increase the premiums tax to 10 per cent or 50 per cent under the guise of an exercise of its police power, leaving to domestic companies a complete exemption, the state could effectively and completely confiscate every asset possessed by petitioner.

Yet, if it be assumed that petitioner is within the state only from year to year, the question as to whether

the gross premiums tax is a condition precedent to the license year commencing March 1, 1942, still remains partly unanswered. It has heretofore been demonstrated that the tax cannot perform this function; it was not a condition precedent to the 1941 license year. Can the respondent require a showing of past compliance with the 1941 law as a condition precedent to renewal of the company's license for the year 1942?

The Illinois Supreme Court answered this question in the affirmative in *Hanover Fire Insurance Company v. Carr*, 317 Ill. 366, 374, 148 N. E. 23, by applying the fallacious reasoning that, since the company was required to show that it had complied with the law requiring payment of the tax before a renewal would be granted, this showing was a valid condition precedent. The Supreme Court of the United States denied the state's right to avoid the equal protection clause by simply providing that failure to comply with the state laws at the end of the period for which the license runs justified a refusal to grant a new license. Petitioner cannot hope to properly paraphrase the following language of this Court (page 514):

" * * * Of course at the end of the year for which the license has been granted, the state may in its discretion impose as condition precedent for a renewed license past compliance with its *valid* laws; but that does not enable the state to make past compliance with Section 30 a condition precedent to a renewal of the license, if as we find that section violates the Fourteenth Amendment, for, as already said, while a state may forbid a foreign corporation to do business within its jurisdiction or to continue it, it may not do so

by imposing on a corporation a sacrifice of its constitutional rights *** (Italics supplied).

Petitioner is not asking that the state surrender or abridge its power to change and revise its taxing system and tax rates, but it does insist that this tax denies to it the equal protection of state laws, the benefit of which inured to the petitioner as a quasi domestic citizen of Oklahoma on March 1, 1941. The state is not deprived of a source of revenue by invalidation of the taxing act, but merely will be required to effectuate substantial equality if it desires to continue collecting taxes on gross premiums. The 1941 act was unconstitutionally discriminatory at its inception and it continues to be. The state may not enforce compliance with a statute that is repugnant to the Federal Constitution.

CONCLUSION

Petitioner asks reversal of the judgment below.

Respectfully submitted,

CHARLES R. HOLTON;
HERBERT R. TEWS,
HENRY S. GRIFFING,
JOHN A. JOHNSON,

Counsel for Petitioner.

December, 1943.

APPENDIX I

Ch. 21, Art. I, Sec. 22, Oklahoma Session
Laws 1909; Sec. 10478, O. S. 1931.

"Every foreign insurance company doing business in this state under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this state within the twelve months next preceding the first of January or since the last return of such premiums was made by such company; and shall at the same time pay to the Insurance Commissioner an entrance fee as provided by Article 19 of the Constitution of the State of Oklahoma, and an annual tax of 2 per centum on all premiums collected in this state, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said Insurance Commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision of municipality of the state. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes; the sum of five hundred dollars; and the company so failing or neglecting

for sixty days shall thereafter be debarred from transacting any business of insurance in this state until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this state."

APPENDIX II

Sections 1 and 2, Chapter 1a, Title 36, pages 121 and 122, Oklahoma Session Laws 1941; 36 O. S. 1941, Sec. 104.

HOUSE BILL No. 353

AN ACT amending Section 10478 and Section 10479, Oklahoma Statutes 1931; providing for an annual tax of four per cent (4%) on all premiums collected in this state, with certain deductions to be paid by all foreign insurance companies doing business in the State of Oklahoma; extending the provisions of such statute to include every foreign corporation, co-partnership, association, inter-insurance exchange or individual who is a non-resident of the State of Oklahoma, doing an insurance business of any nature whatsoever; and providing for the distribution and appropriation of such taxes; and declaring an emergency:

"Be It Enacted by the People of the State of Oklahoma:

"Reports—Gross Premiums.

"Section 1. That Section 10478, Oklahoma Statutes of 1931 be, and is, hereby amended to read as follows:

"Every foreign insurance company, co-partnership, association, inter-insurance exchange or individual who is a non-resident of the State of Oklahoma, doing business

in the State of Oklahoma in the execution of exchange contracts of indemnity, or as an insurance company of any nature or character whatsoever, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this state within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of four per cent (4%) on all premiums collected in this state, after all cancellations and dividends to policy holders are deducted which tax, in addition to an annual tax of three dollars (\$3.00) on each agent, to be paid to the State Insurance Board as now provided by Section 10542, Oklahoma Statutes 1931, shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the state. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars (\$500.00); and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this state until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to

the agent or agents of that company to transact business in this state.'

"Report and Disbursement.

"Section 2. That Section 10479, Oklahoma Statutes 1931, be, and is, hereby amended to read as follows:

"The Insurance Commission shall report and disburse all taxes collected under Section 1 hereof and the same are hereby appropriated as follows, to-wit:

"(a) One-half or fifty (50%) per cent of the four (4%) per cent collected on all premiums by fire insurance companies in this state, shall be allocated and disbursed for the firemen's relief and pension fund as provided for in Sections 6110, 6111, 6112 and 6113 of the Oklahoma Statutes 1931.

"(b) All the balance and remainder of the annual tax of four (4%) per cent provided for in Section 1 hereof shall be paid to the State Treasurer to the credit of General Fund of the State.

"The Insurance Commissioner shall keep an accurate record of all such funds and make an itemized statement and furnish same to the State Auditor, as do all other departments of this state. The report shall be accompanied by an affidavit of the Insurance Commissioner or the chief clerk of his office certifying to the correctness thereof. Provided that nothing herein shall be construed as repealing or affecting the provisions of Section 3744 of the Oklahoma Statutes 1931."

Approved April 25, 1941. Emergency.

APPENDIX III

Chapter 21, Art. I, Sec. 21, Oklahoma Session
Laws 1909; 36 O. S. 1941, Sec. 56.

"Sec. 56. Annual Statement by Companies—Annual License.

"The Insurance Commissioner shall, in December of each year furnish to each of the insurance companies authorized to do business under the provisions of this article, two or more blanks in form adapted for their annual statement, and such companies shall, annually, on or before the last day of February, file in the office of the Insurance Commissioner a statement which shall exhibit its financial condition on the thirty-first day of December of the previous year and its business of that year. For good cause shown, the Commissioner may extend the time within which such statement may be filed. Every such annual statement shall be in the form and of the specifications the Insurance Commissioner may require. The assets and liabilities shall be computed and allowed in accordance with the laws of this state. Such statement shall be subscribed and sworn to by the president and secretary and other proper officers. And if the Insurance Commissioner finds that the facts warrant, and that all laws applicable to said company are fully complied with, he shall issue to said company a license or certificate of authority, subject to all requirements and conditions of the law, to transact business in this state, specifying in said certificate the par-

ticular kind or kinds of insurance it is authorized to transact, and said certificate shall expire on the last day of February next after its issue. The annual statement of a company of a foreign country shall embrace only its business and condition in the United States, and shall be subscribed and sworn to by its resident manager or principal representative in charge of its American business."

APPENDIX IV

Section 12665, O. S. 1931.

"Illegality for which no appeal provided—Payment—Notice of complaint—Suits for recovery.

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days, and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction

thereof, and they shall have precedence therein. If, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

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In the
Supreme Court of the United States
OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,

Petitioner,

AGAINST

JESS G. READ, Insurance Commissioner
for the State of Oklahoma,

Respondent.

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

CHARLES R. HOLTON,
HERBERT R. TEWS,
HENRY S. GRIFFING,
JOHN A. JOHNSON,

January, 1944.

Counsel for Petitioner

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In the
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No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,

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AGAINST

JESS G. READ, Insurance Commissioner
for the State of Oklahoma,

Respondent.

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

This is Not a Suit Against the State
(Petitioner's Brief 12-19;
Respondent's Brief 6-9)

Respondent argues (respondent's brief 6-9) that this action was brought pursuant to Section 12665, Oklahoma

Statutes 1931, and that an action brought under that statute is necessarily a suit against the state. Respondent goes so far as to say (respondent's brief 6) that petitioner "admittedly" brought this action under the authority of that statute and cites page 21 of petitioner's brief as support for the statement. Reference to the last mentioned page will show the statement to be erroneous for at that point in its brief petitioner was arguing its proposition that "even" if this suit were against the state the state has waived its immunity to suit in the Federal court. Plainly petitioner's argument at the point in question was on the assumed premise, for the purpose of the argument only, that the suit was against the state. Apparently respondent would like to have petitioner concede that its recovery must be, if at all, pursuant to Section 12665, but petitioner refuses to make that concession.

In reply to respondent's argument that this action was brought pursuant to Section 12665, petitioner submits that the answer to the question of what petitioner's action consists of, its nature and how it was brought, is to be found by considering the averments made in petitioner's complaint, the contents of respondent's answer, including the admissions there made, and the evidence in the record. If under the case so made petitioner is entitled to the judgment sought, the exact theory of recovery is of no particular moment.

**The Whole Record Shows Suit Not
Against the State**

The whole record of the case-made discloses that this action is not against the State of Oklahoma. The decisions of this Court cited in petitioner's main brief (p. 15); hold that the whole record will be looked at to determine the question of who is the real party to the action. It was decided in 1824 in the case of *Osborn v. Bank of United States*, 22 U. S. 738, 9 Wheat. 738, — L. ed: 204, that the parties to the record will be determined by the way they are named in the action. However, very shortly thereafter this Court modified that holding by the adoption of the more reasonable rule that in determining the parties to the action the whole record will be examined.

In *Reagan v. Farmers' Loan and Trust Company* (1894), 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. Rep. 1047, (petitioner's brief, pp. 22, 23, 24); Mr. Justice Brewer assembled by quotations from prior decisions of this Court an excellent classification pursuant to which various situations may be tested in determining whether the state is being sued. Measured by the tests laid down in that decision and by subsequent decisions of this Court, the whole record here involved indicates that this action is not against the State of Oklahoma. What does the whole record show?

In the written protest under which petitioner paid the taxes here involved (a copy of which protest was made a

part of the complaint) petitioner vigorously asserted that the April 1941 4 per cent tax act was wholly unconstitutional and void, and that the payment pursuant thereto was made to respondent under coercion and duress to avoid burdensome penalties and to prevent cancellation of petitioner's license in the state (R. 9). The protest also enjoined respondent to segregate the fund and not to pay it into the state treasury, and notified respondent that petitioner would "at the time and in the manner provided by law, institute suit for recovery of the same, or take other appropriate action to protect its legal rights * * *" (R. 9, italics supplied). If by these words and if by demanding that the funds be segregated it is indicated that petitioner, among other things, had in mind Section 12665, what difference does it make? The fact remains that respondent did segregate the funds and that those funds remain for all purposes of this suit in an identified fund. The reason or basis for the action of respondent in holding these funds separate is of no moment to this consideration. What does the complaint show on the subject of who is the real party against whom the action is brought?

In the title of its complaint petitioner named as defendant "Jess G. Read, Insurance Commissioner for State of Oklahoma." In its complaint petitioner alleged (R. 2-6) that petitioner "is threatened with deprivation of this (its) property and investment by the collection under duress by the defendant, as Insurance Commissioner

of Oklahoma, of certain taxes levied under color of certain laws of the State of Oklahoma . . . ;" that "by coercion and duress," defendant has collected the tax complained of; that "as required by the Oklahoma laws challenged herein, plaintiff paid said tax . . . involuntarily and under protest and for the purpose of avoiding the burdensome penalties threatened to be imposed and to prevent cancellation of the right of the plaintiff to continue in business within the State of Oklahoma . . . ;" that "the gross premium tax . . . involuntarily paid is unconstitutional, illegal, excessive and void for the reason . . ." that the tax laws complained of "are unconstitutional and in contravention of the Fourteenth Amendment to the Constitution of the United States, Section 1 . . . ;" that the tax laws in question in attempting to levy an arbitrary and discriminatory tax upon plaintiff "seek to deprive the plaintiff of its rights under the Fourteenth Amendment of the Federal Constitution . . . ;" that the act of the defendant in enforcing said revenue measures by receiving and collecting the taxes is in contravention of the Fourteenth Amendment to the Constitution of the United States. And finally that "all of the statutes and the state constitutional provisions indicated and action of the defendant denied to the plaintiff the equal protection of the laws."

And so it appears that there can be no uncertainty on the point that the record shows that petitioner alleges

the April, 1941, taxing statute to be wholly unconstitutional and void, and alleges that the tax which was exacted by respondent under color of that wholly void act was exacted under coercion and duress, and that the tax was paid in order to avoid burdensome penalties and to prevent a cancellation of petitioner's license to transact business in the state. These averments are wholly inconsistent with the contention that the suit is against the state.

One of the principal tests going to determine if an action is against the state is the presence in the action of the issue of whether the statute under which the officer is alleged to have acted is unconstitutional. In such a case the theory is that the individual who is sued has acted without authority, and that it is incumbent upon him to produce a valid law which justified his action. An unconstitutional law will be treated as null and void. If the officer collects and holds tax money under a void statute he acts without right or authority. In the absence of a valid law the officer stands as a wrongdoer and is in no sense acting in behalf of the state. This test applied to the case at bar stamps this action as being one against Jess G. Read, individually.

The duty of respondent in the respects here involved was purely ministerial and no discretion on his part was involved. Segregation of the tax money and holding it intact was a ministerial duty. In case petitioner failed to pay the tax his duty required him to cancel petitioner's

license and to sue for the penalty. The performance by respondent of this ministerial duty would have deprived petitioner of rights guaranteed to it under the constitution. The moneys here involved have been earmarked as property being held in trust, possibly to be returned to petitioner. The money is in a separate fund and petitioner claims that that fund belongs to it. In case the money is repaid to petitioner the general revenue of the state will not be depleted and the only result will be that that revenue will not be wrongfully augmented. The mere fact that petitioner has asserted that respondent is an officer of the state is immaterial and the designation may be considered to be surplusage and *descriptio personae*. The state is not named a party as such.

In the prayer of its complaint petitioner asked for a judgment against respondent for \$8,198.31 and also asked for such other and further relief as is just (R. 6). Such relief as so prayed for, is, it is submitted, neither warranted nor permitted by Section 12665. It is submitted that since this suit is not against the state, Section 12665 is inapplicable to this case.

Section 12665 Is Not Applicable

The forerunner of Section 12665 was Section 9971, Compiled Oklahoma Statutes of 1921. Section 9971, last mentioned, was found in the chapter in the Oklahoma statutes relating to "Revenue and Taxation." / Section 12665,

Oklahoma Statutes of 1931, was found in a chapter of those statutes relating to "Taxation" and "Erroneous or Illegal Taxes." On May 23, 1941, Section 12665, was repealed and a new section, being Par. 15.50, Chap. 68, Oklahoma Statutes 1941, was adopted and it is found in the 1941 statutes under a title relating to "Revenue and Taxation," in the ad valorem code. Thus it appears that at the time petitioner's protest was made, Section 12665, Oklahoma Statutes 1931, was in existence, but at the time petitioner's suit was filed that section had been superceded by the adoption of Par. 15.50, Chapter 68, Oklahoma Statutes 1941.

These various sections in text are virtually identical. A reading of Section 12665, O. S. 1931, will show that the statute did not purport to deal with situations where it is claimed the tax money is exacted under an unconstitutional and wholly void legislative act nor with situations where tax money is paid as the result of coercion and duress. A reading of Section 12665 indicates that by its terms it applies to cases "where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal . . ." As used in the section, the word "illegality" apparently is not intended to refer to a tax which is provided for under a statute which is wholly void, but, on the contrary, is used in the sense of tax which is illegally exacted, either in whole or in part, under a valid statute. This meaning becomes clearer as the statute

is further examined. After providing that the collecting officer shall hold the tax money in a separate fund, the section provides that if suit is brought to recover the money paid and "the court shall determine that the taxes were illegally collected, as not being due the state * * *," then the court shall render judgment "showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings and if such order shows that the taxes so paid are in excess of the legal and correct amount, the collecting officer shall pay to such person the excess * * *."

Thus it appears that the section does not contemplate a judgment in favor of the taxpayer who has paid his money under protest against the collecting officer for any excess payment, but only contemplates a judgment in favor of the collecting officer and against the taxpayer for the amount which the officer is entitled to keep. In case there is an excess in the hands of the collecting officer the section then requires him to refund that excess. The section, it would seem, is intended to cover a situation where the collecting officer has acted under a valid law, but has collected an excess amount or an "illegal" amount. In such a situation the officer may be in possession of some amount, no matter how small, which belongs to the state, whereas no part of any of the taxes collected under a wholly invalid statute would belong to the state.

The correctness of the foregoing observations seems to be confirmed by *City of Muskogee v. Wilkins* (1918), 73 Okla. 192, 195-196, 195 Pac. 497, where a municipal ordinance imposing a tax on the business of operating jitney busses was held to have been enacted without authority of law. It was there held that a bill for injunction was a proper remedy and that plaintiff was not required to proceed under Section 9971, O. S. 1921. The Oklahoma Supreme Court said (pp. 195-6):

"We are of opinion, however, that the provisions of the latter section (Sec. 7, Ch. 107, S. L. 1915—matter in parenthesis supplied), do not affect the remedy invoked in the instant case. The obvious intent of the legislature in the enactment of such provisions was to afford a remedy for the correction of errors in the assessment or equalization of taxes and the recovery, when paid, of taxes illegally assessed against property, arising by reason of official action in those instances where authority to exercise the taxing power existed by reason of the constitution or laws of the state and not to cases such as this, where all authority to impose a tax of any character for revenue has been withdrawn from the political body attempting to exercise such power.

"This purpose is manifested by the provision authorizing a suit to recover such taxes wherein the court shall render judgment showing the correct and legal amount due, etc. Clearly we cannot impute to the legislature an intent to sanction extortion by requiring the payment of a pecuniary imposition entirely unauthorized by the statute, even if made by municipality under guise of police power, where such body is specifically divested of authority to enact or enforce legislation on the subject. We, therefore, conclude that the plaintiff has not mistaken his remedy."

And the above observations likewise seem to be confirmed in *Carpenter et al. v. Shaw, State Auditor of Oklahoma* (1929), 280 U. S. 363, 74 L. ed. 478, 50 Sup. Ct. Rep. 121, where this Court held that an action to recover taxes paid under duress and compulsion and exacted in violation of the laws or constitution of the United States does not come within the provisions of Section 12665 or of its identical predecessor.

The case of *Sneed, Treasurer of the State of Oklahoma v. Shaffer Oil & Refinery Co.* (C. C. A. Okla. 1929), 35 Fed. (2d) 21, involved a suit to recover a tax imposed by an Oklahoma law upon foreign corporations which it was alleged denied to the plaintiff equal protection of the laws, and it was there held that Section 12665 did not apply to payment of taxes made under duress.

The Oklahoma Supreme Court apparently considers that a suit brought to recover tax money which has been commingled with the state's general funds, in which suit the court is not called upon to determine the constitutionality of the law under which the tax was exacted nor to determine if the tax was paid under coercion or duress, is a suit against the state. *Antrim Lumber Company v. Sneed, State Treasurer* (Okla. 1935), 175 Okla. 47, 52 Pac. (2d) 1040 (cited and relied upon, respondent's brief 7-8).

But it is clear that in *Antrim Lumber Company v. Sneed, supra*, the Oklahoma Supreme Court did not determine that a suit to recover taxes in which the court is

called upon to determine the constitutionality of the tax statute or to decide questions of coercion or duress, is a suit against the state or that such a suit is to be considered as governed by Section 12665. Furthermore, that court, in the case in question, approved other decisions which hold that the claim of unconstitutionality or of coercion or duress negate the argument that the suit is against the state. Among the decisions so approved of is the case of *A. T. & S. F. Ry. Co. v. O'Connor* (1912), 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, relied upon by the petitioner (petitioner's brief 13), but not mentioned by respondent.

Trial Court May Have Erroneously Applied Section 12665

With this record and with the foregoing analysis of Section 12665, we come to consider what must have been confusion on the part of the trial court. Notwithstanding that the essence of petitioner's protest, of its complaint, and of its case-made, was the unconstitutionality of the 1941 tax law and the coercion and duress surrounding its payment, the trial court at the pre-trial conference dwelt upon Section 12665 and determined that to recover under the provisions of that section it was unnecessary for petitioner to show coercion or duress (R. 15). It would seem that the court's remarks in this respect were intended to be confined to a possible recovery by petitioner under Section 12665 and it is petitioner's contention that the remarks

of the trial court at this time are to be so understood. Petitioner further contends that the trial court did not intend to, and indeed it could not have, removed from the case the essential issue presented by the pleading of coercion and duress which was an issue independent of any reference to Section 12665. That it was an issue is shown by *Carpenter et al. v. Shaw, State Auditor of Oklahoma, supra*, and by *Sneed, Treasurer, etc. v. Shaffer Oil & Refining Co., supra*.

Whatever the trial court had in mind when making the remarks in question, at least the issue of constitutionality remained at all times, as it still is, in the case. The trial court entered conclusions of law on this issue (R. 29) and the Circuit Court of Appeals (R. 46) made a decision on this issue which, of course, is the main issue in the case. The issue of constitutionality alone adequately places this case in the class of suits which is not considered to be against the state. *A. T. & S. F. Railway Company v. O'Connor* (1912), 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216 (cited, petitioner's brief 13-14).

Petitioner's complaint alleged the facts and prayed certain relief. It contends that it is entitled to recover if the facts warrant any of the relief which is prayed for. Rules of Civil Procedure, Rule 8 (a). Of course, the relief prayed for is a judgment against respondent. And it is petitioner's further contention that if the facts pleaded warrant the relief prayed, the theory upon which the relief

may be granted is of no particular importance. If petitioner is entitled to relief, that relief may be granted either on the theory that the suit is not against the state or on the theory that it is a suit against the state. However, petitioner has sought to show that the correct theory upon which judgment should be rendered against respondent is that he is sued individually, and that the state is neither a necessary nor a proper party to this action. In such case this Court has jurisdiction upon the grounds of diversity of citizenship.

The State Has Waived Its Immunity to Suit in the Federal Courts as Well as in the State Courts
(Petitioner's Brief, 20, 25;
Respondent's Brief, 9, 14)

It is Section 12665, or its successor, to which petitioner looks to find the waiver of immunity by the state for this suit in the federal court in case this suit is one against the state. As petitioner said in its main brief (pp. 20-21) this point becomes academic in case it is determined that this is not a suit against the state. And it is submitted that in accordance with the correct theory to be applied under the law applicable this suit is not against the state.

It is likely true as stated by respondent (respondent's brief 14) that there is not involved under *this point* actions for the recovery of taxes paid under coercion and duress (and petitioner would add taxes paid under a statute claim-

ed to be unconstitutional and void), which are not brought under the authority of a statute waiving the immunity of the sovereign state to suit for recovery thereof.

If petitioner's recovery under its complaint and the evidence can be allowed on the theory of coercion or duress or on the theory that the tax was exacted under an unconstitutional statute or under a combination of both factors, then this suit is not against the state and we are not concerned with the point of waiver of immunity. If, on the other hand, plaintiff can only recover because it paid the tax under protest and brought suit within thirty days under the provisions of Section 12665, and the suit is against the state, then only are we concerned with the question of whether the state has consented in this instance to be sued in the federal court.

This Court found a waiver of immunity to suit in a federal court under a Texas statute. *Reagan v. Farmers' Loan and Trust Company* (1894), 154 U. S. 362, 391, 38 L. ed. 1014, 1021, 14 Sup. Ct. Rep. 1047 (cited, petitioner's brief 22-23, respondent's brief 12). In two other cases where the statutes involved seem to have been less restrictive than that involved in the last mentioned case this Court failed to find such waiver. *Smith v. Reeves* (1899), 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919 (cited, petitioner's brief 18, respondent's brief 10-11). And Michigan, *Chandler v. Dix* (1904), 194 U. S. 590-91, 48 L.

ed. 1029-31, 24 Sup. Ct. Rep. 766 (cited, respondent's brief 11).

As against the statutory provisions involved in those cases, the only provisions of the Oklahoma statute, Section 12665, O. S. 1931, which may be cited as evidence that Oklahoma restricted suit to its own courts are the provisions (quoted, petitioner's brief 21-22, respondent's brief 9-10), that suits filed under the authority of Section 12665 "shall be brought in the court having jurisdiction thereof" and "they shall have precedence therein" and "the court shall render judgment * * *."

It is submitted that petitioner, a non-citizen, should not be debarred from that relief in the federal courts which Oklahoma affords to its own citizens in its own courts.

**The Matter In Controversy Arises Under the Constitution
(Petitioner's Brief, 25-33;
Respondent's Brief, 14-19)**

It is true that Mr. ~~Justice~~ Hughes, in his work on Federal Practice (respondent's brief 16-17), states, in substance, that a case arises under the Constitution of the United States when some title, right, privilege or immunity on which a recovery depends will be defeated by one construction of that constitution or sustained by an opposite construction. It is also true that a similar general statement is made in some of the opinions of this Court cited by respondent as well as in other opinions of

this Court not cited in any of the preceding briefs. However, it is submitted that this Court has not, over the years, adhered to that general statement or if it has, it has considered that when a constitutional right will be defeated by the operation, application or effect of the United States Constitution then the matter involved arises under the Constitution. This statement is borne out by the cases cited in petitioner's brief (pp. 25-33), especially *Ex parte Young* (1907), 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. Rep. 441 (petitioner's brief 31), and *Smith v. Kansas City Title & Trust Company* (1920), 255 U. S. 180, 65 L. ed. 577, 41 Sup. Ct. Rep. 243 (petitioner's brief 32).

**Administrative Practice and Interpretation
(Respondent's Brief, 28-33)**

Respondent's explanation of administrative practice and interpretation demands clarification. The stipulation (R. 20-23) shows:

- (1) When a foreign insurance company desires to enter Oklahoma for the first time, it is required "to file an application for a license therefor, same to expire the succeeding last day of February." It is further required "on or before said date" (which refers to the following February, and not to the time of license application) to pay a tax on all premiums "which it received in Oklahoma after it is so licensed and prior to the succeeding first day of January."

Respondent endeavors to make it appear that by this practice a gross premiums tax is paid at the time of application for entry. In fact, the stipulation shows that the time of payment is reached "after it is so licensed." The procedure is and has been to admit a company and then to tax it.

Under the administrative interpretation of the insurance laws, respondent has considered "said tax as being paid for the right or privilege of entering Oklahoma and doing business therein to and including *said last day of February.*"

Again the reference is to the same date, the succeeding last day of February. Thus the practice is to collect the tax at the end of the first year and after-issuance of the license. The interpretation is that payment is made for the first year. There is no intimation that respondent has ever interpreted the tax as being paid for the next or ensuing license year following "said last day of February."

(2) Stipulation number 5 covers practice and interpretation on license renewal and is the same. The company files another application and is required by respondent "as a condition precedent, *to have paid*" the same tax payment previously mentioned as being paid for the first year of business. Respondent has interpreted the payment "as having been paid for the right or privilege of *having been permitted* to enter Oklahoma and do busi-

ness therein during the *then current* license year" (which is still the first year of business). One year of time has elapsed since the first application, and although respondent refuses to renew the license unless the tax has been paid, this is still the exaction for and during the first license year of business and is so interpreted.

In like manner, administrative practice has required payment of the tax for the second or renewal year at the end of said year and has interpreted the same as payment for the second year.

**Respondent's Point That Annual Privilege Taxes May Be Paid
Either Before or After the Exercise of the Privilege
(Respondent's Brief, 33-35)**

It is established in this case that under the Oklahoma 4 per cent tax statute the tax is not due or collectible until after the end of the calendar year in which the license to do business has been issued, whether that license be an initial or a renewal license. In other words, the due date of the tax comes after the expiration in whole or in part of the time during which the foreign company has been authorized to do business in the state. The tax is collectible upon business done after the transaction of that business has been authorized. The constitution so reads (petitioner's brief 33-34). The statute so provides (petitioner's brief, appendix II). The stipulation of facts so reads (R. 20-21). The trial court so concluded (R. 24-

27, 29-30). The Oklahoma state court so found in the *Lincoln National Life* case (R. 36, 38). The case of *Hanover Fire Insurance Co. v. Harding*, 272 U. S. 494, 71 L. ed. 379, 47 Sup. Ct. 179, 49 A. L. R. 713 (petitioner's brief 45-47), held that if such a tax is discriminatory it is unconstitutional and void because the tax is not an exercise of the police power of the state through the imposition of a tax as a condition to admittance to the state and is thereby arbitrary.

Respondent's argument indicates confusion due probably to the inaccurate use of the word "privilege" when referring to taxes. Perhaps it would not be incorrect to call a tax a "privilege" tax which is imposed under the police power and which is required actually to be paid before and as a condition precedent to the granting of a license to do business in the state, but neither is it incorrect to call a tax payable at a subsequent date a "privilege" tax. The fact remains, however, that the tax payable before entrance is levied in exercise of the police power whereas the tax payable at a date after entrance is not so levied.

Respondent's own effort to state that payment of the 4 per cent tax is a condition precedent shows the impossibility of stating something to be that which it isn't: For instance, respondent, in enumerating (pp. 29-30) the items with which a foreign company must comply when first entering the state, says it is required "(e) to pay" the 4 per

cent tax, but when does he say it is to be paid? He says it is to be paid "on or before the next succeeding last day of February." And he says to obtain a license for succeeding years such a company is required "(e) to show payment" of the tax, for what—"for the privilege of having been permitted to enter Oklahoma and to do business therein during the then current license year."

Respondent asserts and reiterates (pp. 2, 3, 16) in the form of two categorical statements his conception of petitioner's contention in this case. Sufficient it is to say that petitioner denies the validity of the tax in question under any hypothesis.

The case of *Pacific Mutual Life Insurance Co. v. Hobbs, Commissioner of Insurance* (Kan., 1940), 152 Kan. 230, 103 Pac. (2d) 854 (discussed respondent's brief 34-35, 59-61), did not deal with the question of whether the tax there involved was repugnant to the equal protection clause of the federal constitution.

**Respondent's Point That the Commissioner Did Not Make an Unconstitutional Application of the 1941 Act by Requiring Companies Seeking to Obtain a License for 1942 to Pay a 4 Per Cent Tax on Premiums Collected During 1941.
(Respondent's Brief, 58-63)**

The tax due at the close of the license year 1941 was a tax on the business done during the calendar year 1941. Notwithstanding this fact, however, respondent required as a condition to the issuance of licenses on March 1, 1942,

a showing that the tax due on the 1941 business had been paid.

In this manner respondent did exact a payment of the tax on 1941 business as a condition to and before the issuance of licenses on March 1, 1942. The stipulation of fact, the conclusions of the trial court and the conclusions of the state court in the *Lincoln National Life* case confirmed this practice. Was the commissioner authorized under the law to impose in this manner the payment of the tax on 1941 business as a condition precedent to the issuance of 1942 license? No doubt he found his authority for so doing in the Oklahoma constitutional provision that a foreign insurance company shall not receive a license until it shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the legislature on foreign insurance companies (Sec. 1 of Art. XIX, petitioner's brief 33, respondent's brief 24).

Was the commissioner justified under the law in enforcing the foregoing constitutional provision and thus treating payment of the tax on 1941 business as a condition precedent to the issuance of 1942 licenses? The answer must be in the negative under the authority of the case of *Hanover Fire Insurance Co. v. Harding, supra*. According to that case, such a provision is a valid provision, but it is to be construed to apply only to such taxes as are valid when tested by the provisions of the United States Constitution. It is submitted that since the tax on 1941

business was an invalid imposition because its payment followed the authority granted to do business in the state, it could not be assigned as a tax which would have to be paid before the 1942 license was issued.

Gross Premium Tax Laws of Other States
(Petitioner's Brief, 38, 40)

The only thing convincing found in the table of premium taxes supposedly imposed by the different states in the union, is the indication that the 4 per cent tax in Oklahoma is the largest of any of the taxes in any of the states except possibly the State of South Carolina, which has a higher tax on workmen's compensation premiums, and a much lower tax on premiums on all other types of insurance. Respondent states (p. 38) that he has been unable to find a single case holding any of said laws invalid under either the Fourteenth Amendment or any other constitutional provision. The statement may be true, but it does not follow that all of those tax laws are valid. In order to determine the validity of any particular tax, the nature of the tax and its imposition would have to be explored. A premiums tax was challenged and held invalid in the Hanover Fire Insurance Company case and presumably if any of the taxes in other states are imposed in a similar manner as those involved in that case they would likewise be held unconstitutional under a proper challenge.

It may be that some of the taxes mentioned in the Taxation Manual are imposed in the manner of that made use of in the Illinois 1919 statute cited in petitioner's brief at page 37. That statute provides for the payment of an arbitrary lump sum when a company first enters the state. When the company subsequently is relicensed it is then called upon to pay as a license fee a lump sum computed by a percentage of the premiums received by it in the state during the preceding calendar year. It is submitted that there could be no objection to that type of a tax. The Oklahoma tax is not that kind of a tax. Furthermore, in answer to respondent's point, it is entirely possible that a foreign company might not object to the payment of a 2 per cent tax regardless of the mechanics through which it is levied; whereas, an effort to skyrocket the tax may well call forth a challenge.

**The Philadelphia Fire Association Case
(Respondent's Brief, 41-44)**

Retaliatory legislation was considered in *Philadelphia Fire Association v. New York* (1886), 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108. Respondent's observation (p. 44) that Oklahoma has a retaliatory section (36 O. S. 1941, Sec. 106), referring to taxation of Oklahoma companies in other states does not mean that the 4 per cent gross premiums tax is a part of the retaliatory section. The two are separate.

Respondent further asserts (p. 44) that 40 of the 48 states have retaliatory gross premiums taxing laws as shown by the Taxation Manual. Petitioner disputes the inference that all gross premiums taxes are retaliatory in form and nature.

No opinion of this Court seems to have commented upon the retaliatory feature involved in the Philadelphia Fire Association case, *supra*, although the purpose of such a statute, in contrast with the act challenged here, is not to police foreign insurance companies, but to insist that sister states give fair treatment to those citizens of the home state who may do business within the sister states. In this respect, retaliatory tax legislation savors of a different variety of police power from that urged by respondent in the case at bar.

In the course of its opinion in *Southern Railway Company v. Greene*, 216 U. S. 400, 415, 416, 54 L. ed. 536, 30 Sup. Ct. Rep. 287, this Court referred to the Philadelphia Fire case among others, but refused to follow its principle, saying that it had "adverted to these cases with a view of showing that the precise point involved herein is not concluded by any of them," and that, "we have here a foreign corporation within a state, in compliance with the laws of the state"

At the time of enactment of the 4 per cent gross premiums tax and at the time of payment, petitioner was within Oklahoma in compliance with all of its laws; it was on

an equal footing with competing domestic companies and entitled to equal protection instead of discriminatory treatment.

The Hanover case, cited *supra*, placed its chief reliance upon *Southern Railway Company v. Greene, supra*. The Philadelphia case was cited in briefs but the Court did not discuss it directly. Instead, it pointed to opinions upon which the Philadelphia case was based, notably *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, and *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972, as settling the principle that states may impose such conditions as they will upon foreign corporations desiring to enter their jurisdictions (It: neither of the cases last cited was the Fourteenth Amendment applied). The Court, in the Hanover case, then said, 272 U. S. 494, 507:

"But there is a very important qualification to this power of the state, the recognition and enforcement of which are shown in a number of decisions of recent years."

In adding a qualification upon the power of a state to tax a foreign corporation admitted to the state, and following *Southern Railway Company v. Greene, supra*; it is submitted that this Court qualified the extent of the rule of *Philadelphia Fire Association v. New York, supra*.

If, on the other hand, the broad scope of that opinion was not narrowed, it seems clear that the gross premiums tax collected therein was a true and, therefore, valid condition precedent to the renewal license sought. The Penn-

sylvania corporation entered New York in 1872. It was qualified, admitted and doing business in that state when the Pennsylvania premiums tax law was passed in 1873. New York's retaliatory legislation immediately became self-executing. At the time the foreign corporation applied for a license renewal it *had paid* for the year's business then expiring. Its business experience formed a standard by which the "new tax" could be measured and the tax was capable of payment in a lump sum *prior* to the license renewal. Having previously paid for the current license year, the company was required to pay for the ensuing license year and payment was required in advance. As the Court said, the license fee was imposed "as a prerequisite for the future" (p. 119).

For the foregoing reasons, petitioner suggests that the Philadelphia Fire Association case is not controlling.

**The Lincoln Life Insurance Company Case
(Respondent's Brief, 47, 50)**

The findings of the District Court for Oklahoma County (R. 36-38) are virtually a recital of the administrative practices and interpretations heretofore discussed. They are incorporated in the findings on the premise that the *nisi prius* court will take judicial notice thereof since they have been effective since 1909 and are matters of common knowledge.

One of the counsel for respondent prepared the findings, as is the frequent Oklahoma practice (R. 35). The ruling on demurrer was appealed to the Supreme Court of Oklahoma (R. 38); it is not found in any reporter system.

Respondent argues that this decision must control this Court on the constitutional question here presented. Petitioner disputes the contention.

Petitioner submits that the state *nisi prius* decision cannot circumscribe the right and duty of the United States Supreme Court to determine whether the Oklahoma statute denies to petitioner equal protection of the laws. *Carpenter et al. v. Shaw, State Auditor of Oklahoma* (1929), 280 U. S. 363, 50 Sup. Ct. Rep. 121, 74 L. ed. 478; *Quaker City Cal Co. v. Commonwealth of Pennsylvania*, 277 U. S. 389, 72 L. ed. 927, 48 Sup. Ct. Rep. 553; *State of Wisconsin et al. v. J. C. Penny Company*; 311 U. S. 435, 85 L. ed. 267, 61 Sup. Ct. Rep. 246. It seems clear that the doctrine of *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 Sup. Ct. Rep. 817, making the state common law and statutes the law governing federal decisions was limited to exclude "matters governed by the federal constitution or by acts of Congress," and that *Fidelity Union Trust Company et al. v. Field*, 311 U. S. 169, 85 L. ed. 109, 61 Sup. Ct. Rep. 176, is subject to the same limitation.

If regard is to be given to the *nisi prius* decision, it is to be noted that it conforms to the administrative practice and interpretation stipulated herein, which establish that the tax involved was paid at the end of the 1941 license year and for said year. Since the court found that payment followed admission instead of preceding it, the findings of fact completely contradict the legal conclusions drawn therefrom. In addition, the court did not determine that the 4 per cent tax paid at the end of the 1941 license year was a valid condition precedent to doing business during the ensuing 1942 license year.

The finding that the 4 per cent taxing act passed in April, 1941, was a tax to be paid on all premiums collected during the calendar year 1941 confirms petitioner's objection to the levy of a tax in the midst of a license year for which it had previously received authority to transact business and when it stood on a level with domestic companies. If the *nisi prius* court is to govern the finding of this Court, those findings confirm petitioner's contentions with respect to both interpretation and application of the taxing act.

**The Hanover Fire Insurance Company Case
(Respondent's Brief, 50-58)**

The bulk of respondent's discussion of this case is devoted to establishment of the fact that the Illinois 1919 gross premiums tax was paid as a valid condition prece-

dent to the right to do business in Illinois for the ensuing year. With this contention petitioner fully agrees. While constitutionality of the 1919 gross premiums tax was not directly involved, this Court properly treated the tax as requiring an advance lump sum payment for a privilege yet to be extended by the state. By compliance with this valid condition precedent, the company was put on a level with domestic insurance companies, but the net receipts tax under Section 30 (1869), like the Oklahoma form of gross premiums tax, applied *after admission* of the company. Since it was a tax, as distinguished from an "entrance fee," it could not meet the test of equal application.

It was not necessary for the Illinois 1919 gross premiums tax law to be analyzed by this Court. Section 6 of the 1919 law provided that the tax should "be the tax for the year commencing on the first day of July in which it is due and ending on the thirtieth day of June next thereafter" (the ensuing license year). Section 13 of that law applied to companies applying for original admission thereafter. It provided that such companies should:

"before said license is issued, pay * * * at the rate of three hundred dollars per annum for as many months as will elapse between the date of issuance of such license and the first day of July of the calendar year succeeding * * * and such payment shall be for the privilege of doing an insurance business in this state, during the period aforesaid."

Prior to admission, a company made a lump sum payment for the ensuing year or portion thereof. Under other

sections of the statute, on the following July 1, the company made a second lump sum payment at the rate of 2 per cent of the gross premiums it had by that time received. This payment was for "the year next ensuing" (Sec. 9). Each payment preceded issuance or renewal of the license. Illinois had, and now has, a prospective privilege tax (See 1943 Illinois Revised Statutes, Ch. 73, Sections 1021-1025). Oklahoma does not.

**The New York Life Insurance Company Case
(Respondent's Brief, 44-46)**

Petitioner submits that neither the form of Oklahoma's taxing act nor its practical operation are prospective. The fact was acknowledged by the Oklahoma court in *New York Life Insurance Company v. Board of Commissioners of Oklahoma County* (Okla. 1932), 155 Okla. 247, 9 Pac. (2d) 936, when it was said:

"In the case at bar no lump sum is designated as a license fee or privilege tax for the purpose of transacting business within the state."

Petitioner pointed out in its original brief (p. 41) that the court did not find the gross premiums tax to be a condition precedent or "entrance fee" and that constitutionality of the law was not in issue.

CONCLUSION

As respondent's brief has illustrated, gross premiums tax laws are widespread. Insurance companies have been

accustomed to them. Doubtless the great majority of those acts are, like that of Illinois, clearly constitutional on their face. And in the few remaining states the tax burden may well be equalized by imposition of other taxes on domestic companies. *Concordia Fire Insurance Company v. Illinois*, 292 U. S. 535, 78 L. ed. 1411, 54 Sup. Ct. Rep. 830. Of course, the prevalence of gross premiums tax laws elsewhere has been urged upon the Court as an indirect argument that a ruling of unconstitutionality herein would compel changes of policy and readjustment of state laws. It does not seem apparent that such results would follow. Oklahoma should be directed to constitutional paths by a requirement that gross discrimination be eliminated.

Where immunity from taxation is ultimately attributable to the Constitution of the United States, a state will not be allowed to invade that immunity, no matter how skillful its legal manipulations. *Board of County Commissioners of Jackson County v. United States*, 308 U. S. 343, 350, 84 L. ed. 313, 316, 317, 60 Sup. Ct. Rep. 285.

Petitioner renews its request for reversal of the judgment below.

Respectfully submitted,

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January, 1944.

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In the
Supreme Court of the United States

OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

vs.

JESS G. READ, Insurance Commissioner for
the State of Oklahoma,
Respondent.

**BRIEF IN RESPONSE TO PETITION FOR
WRIT OF CERTIORARI**

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September, 1943.

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The action involved here is, in reality, a suit against the State of Oklahoma by a citizen of another state, and hence brought in violation of the 11th Amendment of the Constitution of the United States for the reason that said state has not consented to be sued for the	

recovery of taxes paid under protest except in its own courts	30
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In the
Supreme Court of the United States
OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

vs.

JESS G. READ, Insurance Commissioner for
the State of Oklahoma,
Respondent.

**BRIEF IN RESPONSE TO PETITION FOR
WRIT OF CERTIORARI**

SUMMARY STATEMENT OF MATTERS INVOLVED

The statement which appears on pages 1 to 6 of the petition herein is substantially correct. However, since the reference therein to respondent's answer (R. 12), in so far as said answer refers to petitioner's original entrance in Oklahoma in 1922, is susceptible of being construed as an admis-

sion by respondent that the Great Northern Life Insurance Company was—

- (a) then licensed and authorized to do business in Oklahoma for a longer period than the license year ending February 28, 1943, and
- (b) then a citizen in Oklahoma for a longer period than said license year,

respondent desired to specifically call attention to the sixth paragraph of said answer (R. 12-13), which clearly shows to the contrary.

Moreover, the first paragraph of said statement (P. 1), which recites that:

“This case challenges the validity under the equal protection clause of the Fourteenth Amendment to the Federal Constitution of the Oklahoma gross premiums tax law of 1941, and is the first test of the validity of this law,”

is not correct since prior to the filing of said case in the United States District Court for the Western District of Oklahoma on March 28, 1942 (R. 11), an essentially identical case was filed by the Lincoln National Life Insurance Company against this respondent in cause No. 105,488, in the District Court of Oklahoma County, Oklahoma, which also challenged the validity, under the equal protection clause of the Fourteenth Amendment, of the Oklahoma gross premiums tax law of 1941.

The validity of said act was upheld by the state district court on September 8, 1942, while the validity thereof was not upheld by the Federal District Court until October 14, 1942. An appeal was taken on March 8, 1943, by the Lincoln

National Life Insurance Company from the decision of the state district court to the Supreme Court of Oklahoma (briefs have been filed by both parties), while the instant petition for a writ of certiorari and supporting brief was not filed in this Court until August 6, 1943.

Said appeal in the Oklahoma Supreme Court involves, as does this case, (a) the construction and meaning of the constitutional and statutory provisions of the State of Oklahoma providing for an annual tax of two per cent, now four per cent, on the Oklahoma premiums of foreign companies doing business in Oklahoma, and (b) whether or not said provisions as so construed violate the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF BASIS OF JURISDICTION

The statement above mentioned is set forth on page 6 of the petition for writ of certiorari herein, as follows:

“It is believed that the jurisdiction of this court to review the judgment in question is sustained by:

“Section 240 of the Judicial Code as amended (Title 28, Sec. 347, Subd. [a], U. S. C. A.)

“Rule 38, Section 5, Sub-sec. (b), Rules of the Supreme Court as amended.”

It will be noted that the above statement does not contain, as required by Section 2 of said Rule 38,

“a statement *particularly disclosing* the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question; * * *”

It will also be noted that Sub-section (b), Section 5 of said Rule 38, referred to by petitioner, recites five distinct bases (not exclusive) under which this Court, in its discretion, has jurisdiction to review the judgment or decree of a United States Circuit Court of Appeals upon a petition for a writ of certiorari, same being set forth therein as follows:

“Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter;

“or has decided an important question of local law in a way probably in conflict with applicable local decisions;

“or has decided an important question of federal law which has not been, but should be, settled by this court;

“or has decided a federal question in a way probably in conflict with applicable decisions of this court;

“or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court’s power of supervision.”

By reason of the failure of petitioner to *particularly disclose* in its said quoted statement which of the above bases it contends this Court has jurisdiction to review the judgment and decree involved here, neither respondent nor this Court is able to determine from said statement the basis upon which petitioner relies.

QUESTION PRESENTED

By an examination of the question above referred to, which is set forth in the petition for writ of certiorari herein (P. 67), as follows:

"Correctness of the Circuit Court's decision that Oklahoma had power, despite the equal protection clause, to levy a heavily discriminatory tax on a foreign insurance company's 1941 business during the year 1941, after the company's due admission to the state in compliance with laws then in force, and at a time when the foreign company stood on an equal plane with domestic companies, under Oklahoma law, and pending the business year already authorized,"

which question is in substance set forth as the "Assignment of Error" on page 15 of said petition, it will be found that the question presented to this Court by petitioner is *apparently limited* to the legality of the payment of a foreign insurance company licensed to do business in Oklahoma for the license year beginning March 1, 1941, and ending February 28, 1942, of a four per cent tax, *rather than a two per cent tax*, on the amount of premiums, less proper deductions, it collected in Oklahoma during the calendar year 1941:

If petitioner intended to so limit said question, same is necessarily based on the proposition that since the 1941 Act (P. 10-12), raising the annual premium tax from two to four per cent, did not go into effect until April 25, 1941, to-wit: until after the beginning of the license year ending February 28, 1942, the Insurance Commissioner of Oklahoma erred in applying said four per cent tax to said license year.

If it was the intention of petitioner to so limit said question it would not appear that this Court should issue the writ of certiorari prayed for, since a decision as to said question—

- (a) would only govern in the instant case, as petitioner and the Lincoln National Life Insurance Company, heretofore referred to (whose appeal is now pending in the Supreme Court of Oklahoma), are the only companies who have challenged the application of said four per cent tax, rather than said two per cent tax, to said license year, and
- (b) would not apply to premium taxes collected for the privilege of entering Oklahoma and doing business therein for subsequent license years.

However, in relation to the merits of said limited question, attention is called to our analysis of the case of *Pacific Mutual Life Insurance Company v. Hobbs, Commissioner of Insurance* (Kan. 1940), 103 Pac. (2d) 854, set forth in the subhead "Annual Privilege Taxes May Be Paid Either Before or After Exercise of Privilege" of this brief.

A R G U M E N T

Inasmuch as the "Argument" set forth on pages 16 to 28 of the petition for writ of certiorari herein is not addressed to the limited question apparently presented by petitioner, as aforesaid, respondent will address his argument herein to the basic proposition actually involved in the instant case, same being as follows:

**"THE ANNUAL TAX OF TWO PER CENTUM
(SINCE APRIL 25, 1941—FOUR PER CENTUM) COL-
LECTED ON THE OKLAHOMA PREMIUMS OF
FOREIGN INSURANCE COMPANIES IS NOT AND
NEVER HAS BEEN INVALID UNDER THE PRO-
VISIONS OF THE 14TH AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES BY
REASON OF THE FACT THAT A LIKE TAX IS**

NOT COLLECTED ON THE OKLAHOMA PREMIUMS OF COMPETING DOMESTIC INSURANCE COMPANIES."

In connection with the above proposition respondent calls attention to the "Stipulation of Facts" in this case (R. 22-27), which, omitting its caption and signatures, is quoted herein, for the convenience of the Court, as follows:

"It is stipulated and agreed by and between the parties hereto as follows:

"(1) That the sum of \$8,189.32, paid by plaintiff to defendant under protest, has been held by defendant separate and apart from the General Revenue Fund of the State Treasury of Oklahoma, as provided by Section 12665, O. S. 1931, and that said sum will not be deposited in said fund unless and until there is a final adjudication in favor of defendant and against plaintiff, but if plaintiff obtains a final adjudication in its favor, the amount found by the court to be due plaintiff will be paid to it, as provided in said section.

"(2) That domestic life, health and accident insurance companies competing in Oklahoma with plaintiff do not pay any kind or type of taxes to said state which are not likewise paid by plaintiff, except that said competing domestic insurance companies pay an annual income tax, from which tax plaintiff is exempt, the amount of which tax, however, is approximately only 1/20th of the amount the four per cent tax would bring on the premiums collected by said companies in this state, less proper deductions.

"(3) That during the period beginning November 16, 1907, and ending December 31, 1941, the total receipts of the Oklahoma Insurance Department from the two per cent tax on gross premiums of foreign insurance companies, and from the annual entrance and agents' fees of such companies, aggregate \$25,585,107.34, while the expenses of said department during said period aggre-

gate \$910,107.34, said expenses being approximately 3.55 per cent of said total receipts, and that since December 31, 1941, said expenses are approximately only 2 per cent of the gross receipts thereof.

“(4) That under the *uniform administrative practice* of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company desires for the first time to do business in Oklahoma, *it is required*, among other things, to file an application for a license therefor, same to expire the succeeding last day of February (see true and correct copy of such an application attached hereto as ‘Exhibit A’), and on or before said date, *to pay* a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it receives in Oklahoma after it is so licensed and prior to the succeeding first day of January; and that under the *uniform administrative interpretation* by said Commissioner of the insurance laws of Oklahoma since said effective date, he has considered and treated said tax as being paid for the right or privilege of entering Oklahoma and doing business therein to and including said last day of February, and a license issued by him to said company (see true and correct copy of such a license attached hereto as Exhibit ‘B’) as expiring by operation of law and its express terms on said date. It is understood that plaintiff does not agree to the correctness of the above administrative interpretation.

“(5) That under the *uniform administrative practice* of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company holding a license to do business in Oklahoma during any license year (same being from March 1 to and including the succeeding last day of February), desires to do business therein during the ensuing license year, *it is required*, among other things:

“(a) to file, on or before the last day of February of the current license year, an application for a

license therefor (see true and correct copy of such an application attached hereto as 'Exhibit A'),

"(b) as a condition precedent, *to have paid* a tax of two per centum (since April 25, 1941—four per centum), on all premiums, less proper deductions, which is received in Oklahoma during the preceding calendar year, and

"(c) on or before the last day of February of said succeeding license year, *to pay* a similar tax on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year;

"and that under the *uniform administrative interpretation* of said Commissioner of the insurance laws of Oklahoma since said effective date, he has considered and treated the tax first above mentioned as having been paid for the right or privilege of having been permitted to enter Oklahoma and do business therein during the then current license year, the tax last above mentioned as being paid for the right or privilege of having been permitted to enter Oklahoma and to business therein during said ensuing license year, and a license issued by him to said company (see true and correct copy of such a license attached hereto as 'Exhibit B'), as expiring by operation of law and its express terms at the end of said license year. It is understood that plaintiff does not agree to the correctness of the above administrative interpretation.

"(6) That under the *uniform administrative practice* of the State Insurance Commissioner since April 25, 1941, the effective date of Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, the annual four per cent tax on premiums, referred to in said section, has been levied and collected on all premiums received by licensed foreign insurance companies in this state, less proper deductions, 'within the twelve months next preceding the first day of January, 1942,' as well as on all premiums, less proper deductions, received by said companies in this state after said date. It is understood that plaintiff does not

agree to the correctness of the above administrative practice."

**Pertinent Conclusions of Law
of the Trial Court**

In relation to the 4th and 5th paragraphs of the stipulation herein (R. 23-24), above quoted, respondent desires to call attention to the 6th, 7th and 8th paragraphs of the "Conclusions of Law" of the trial court (R. 32-33), which are based on said paragraphs of said stipulation. Said conclusions of law are in harmony with respondent's position here, and we respectfully ask the Court to carefully consider the same.

The Lincoln Life Insurance Company Case

Inasmuch as the District Court of Oklahoma County on September 8, 1942, handed down a decision (R. 39-43) in the above case, as aforesaid, the first cause of action of which it is stipulated (R. 38), "involved issues substantially the same" as those involved in petitioner's complaint, in which decision said court construed the meaning of the constitutional and statutory provisions of Oklahoma involved in this case in relation to issues identical to those involved here, and since neither of the appellate courts of Oklahoma have directly construed said provisions in relation to said issues, respondent respectfully asks this Court to carefully consider said decision and especially paragraphs (a) and (b) thereof (R. 40-42).

While it is true that the above decision (same being the only applicable Oklahoma district court decision) is not that of an appellate court of this State (although such district courts exercise certain final as well as intermediate appellate powers), it is a decision of a constitutional trial court having "general jurisdiction (*Samuels v. Granite Savings Bank & Trust Company*, 150 Okla. 174, 1 Pac. [2d] 145), which is "endowed with the dual power of a court of equity and a court of law" (*Wentz v. Thomas*, 150 Okla. 124, 15 Pac. [2d] 65), and hence has judicial powers essentially the same as those exercised by vice-chancellors of the Court of Chancery of the State of New Jersey. In this connection it will be noted that in the recent case of *Fidelity Union Trust Company et al. v. Field*, 311 U. S. 169, 85 L. ed. 109, decided January 6, 1941, it was held that decisions of vice-chancellors of the Court of Chancery of the State of New Jersey, construing a statute of that state, were binding not only on a United States District Court sitting in said state as to the meaning of said statute, but upon the United States Circuit Court of Appeals, on appeal.

**Annual Privilege Taxes May Be Paid Either
Before or After Exercise of Privilege**

The fact that the annual privilege taxes involved here are paid after rather than before the exercise by a foreign insurance company of the privilege of entering Oklahoma and doing business therein during any license year, is immaterial. This is especially true in Oklahoma since proof of

the payment of said privilege taxes by a foreign insurance company is a condition precedent to the issuance of a license thereto for the ensuing license year.

In this connection, attention is called to the case of *Carpenter, Insurance Commissioner, v. Peoples Mutual Insurance Co.* (Cal. 1937), 74 Pac. (2d) 508, wherein the second paragraph of the syllabus is as follows:

"The payment of a privilege tax may precede exercise of privilege or follow it, the choice of method being within legislative discretion, and where tax is proportionate to amount of business alone, it is equitable that it be paid after conclusion of year in which privilege is exercised."

Attention is also called to the recent case of *Pacific Mutual Life Insurance Company v. Hobbs, Commissioner of Insurance* (Kan. 1940), 103 Pac. (2d) 854, wherein the syllabus is as follows:

"1. Our statute, G. S. 1935, 40-252, requiring foreign insurance companies at the time of making annual statements required by law, to pay taxes on the gross amount of premiums received by them for business done in the state during the preceding year, imposes such taxes, payable at the end of the year, for the privilege of doing business in the state.

"2. The tax on gross premiums received by foreign insurance companies for business done in the state is an excise tax in the nature of a franchise or privilege tax on the privilege of doing business, and partakes of a license tax in the sense that payment thereof is required as a condition precedent to the renewal of such companies' certificates of authority."

By an examination of the body of the opinion in the above case it will be noted that the plaintiff company therein

unsuccessfully asked for a writ of mandamus requiring the Insurance Commissioner of Kansas to refund certain premium taxes paid by it under protest in January, 1937, under the theory:

- (a). that the laws of said State required such taxes, although computed on premiums collected during the preceding year, to be paid for the privilege of doing business in Kansas during the ensuing year, and
- (b). that since the company whose business it had taken over under an assumption agreement in July, 1936, had paid in January of said year, a tax for the privilege of doing business in Kansas during the year 1936, the plaintiff company could not be required to pay a tax on premiums collected by said company prior to July, 1936.

In refuting said theory the Kansas court held:

"The tax is on the privilege of doing business in state,—the tax is fixed at a percentage of premiums received during the preceding year. The payment of the tax follows the exercise of the privilege. The method selected appears to be both equitable and convenient.

"Upon the theory advanced by the plaintiff a foreign company coming into the state would be exempt from taxation upon the business done in the first year, if it withdrew at the end of the first year. It is not to be presumed the legislature intended to exempt a foreign insurance company from taxation upon its first year's business.

"In support of the suggestion that the tax is prospective privilege tax; counsel rely on *McNall v. Insurance Co., supra*. That case arose shortly after the original premium-tax statute was enacted. The insurance company had been doing business in the state before the law was passed. The vital question before the court was formulated in the first paragraph of the opinion which reads (65 Kan. 694, 70 Pac. 605): 'It is insisted by coun-

sel for defendant in error that the law set forth in the statement was given retroactive effect by the collection, under its authority, of taxes from the insurance company for the year 1899, based on business done in 1898, and that in fact the tax was on insurance written before the law was passed. With this contention we do not agree.'

"The argument of counsel, adverted to by the court, was that if the tax was collected it would be a tax on insurance written before the law was passed. The question whether the law was prospective or retroactive in its operation was germane to the issue before the court. In the present case we are not confronted with any question as to the retrospective operation of our statute. That decision was based on an unusual state of facts and the doctrine there announced is not to be extended."

It will thus be noted that the Kansas court, while holding in the case there under consideration that the premium tax of that state was collected at the end of the license year for the privilege of doing business in Kansas during said year, also held in said cited case that since said tax was required to be paid as a condition precedent to securing a license to do business in Kansas during the ensuing license year, a company seeking a license shortly after said law went into effect had to pay said tax on all of the premiums it had collected during the prior year, even though part thereof were collected before said law went into effect. It further held that this fact did not make said law retroactive.

The fact that petitioner first entered Oklahoma after the annual two per cent premium tax law was enacted but before the 1941 annual four per cent premium tax law went into effect, is immaterial.

The fact that said annual privilege tax was raised from two to four per cent after the petitioner insurance company was first licensed or permitted to do business in Oklahoma in 1922, for the license year ending February 28, 1923, is immaterial. In this connection attention is called to the case of *Northwestern National Insurance Company of Milwaukee v. Lee* (C. D Or., 1931), 49 Fed. (2d) 274, wherein the third paragraph of the syllabus is as follows:

“Foreign corporation, permitted to enter state and engage in business, has right to invoke equal protection clause, whether unjust discrimination arise under prior or subsequent legislation.”

The above case clearly holds that for a discriminatory tax levied by a state against a foreign corporation to be valid, it must be levied for the right or privilege of doing business in the State and not for the right or privilege of performing some desired act after it acquired the right to do business therein. Said case further holds that if a discriminatory tax is levied against a foreign corporation, not for the right or privilege of doing business in the State, but for the right or privilege of performing some desired act after it had acquired the right to do business therein, the tax is invalid regardless as to whether or not the law levying the same was enacted before or after the corporation acquired

the right to do business in said State. Therefore, if the annual privilege tax involved here was not levied for the right or privilege of doing business in the State, it was invalid as to the petitioner insurance company even before it was increased from two to four per cent in 1941.

**Gross Premium Tax Laws of
Other States**

On pages 7 and 8 of the petition for writ of certiorari herein it is asserted that:

"The precedent established by the circuit court's opinion is of the utmost importance to many Oklahoma insurance policy holders and in the interest of the public should be reviewed before the legislatures of various other states seek to adopt similar discriminatory laws."

Petitioner in making the above assertion fails to note that, as will hereinafter be shown, the laws of at least 29 of the 48 states already require the payment of designated percentage taxes on premiums collected therein by foreign insurance companies, although no like tax, nor a compensating or equalizing tax, is required to be paid by competing domestic insurance companies. However, respondent has been unable to find a single case holding any of said laws invalid under either the Fourteenth Amendment of the Constitution of the United States or any other constitutional provision, and petitioner has cited none. Said laws have been in force in many instances far longer than the Oklahoma law involved here, and apparently have been considered con-

stitutional and valid by all foreign insurance companies adversely affected thereby.

In practically all of such statutes other annual fees, similar to the annual "entrance fees" referred to in the second paragraph of Section 2, Article 19 of our State Constitution, are collected from said foreign insurance companies, but such collections have apparently not been treated by the courts as preventing said designated percentage taxes on premiums, although discriminatory, from being considered valid.

Moreover, if the annual "entrance fees" mentioned in said second paragraph are the sole fees or taxes paid by foreign insurance companies for the right or privilege of entering Oklahoma and doing business therein, as contended by petitioner, it is clear, inasmuch as said fees are required to be paid at the beginning of each license year, that when such a company first (or subsequently) enters Oklahoma to do business therein, it does so for only one license year, and not, as also contended by plaintiff, indefinitely.

In support of the statement above set forth as to the laws of other states, respondent respectfully calls attention to the booklet "Taxation Manual (1942-1943)," published by "The National Board of Underwriters," which reveals that in at least 29 of the 48 states foreign insurance companies are required to pay designated annual percentage taxes on premiums therein (as well as other annual fixed fees), although like or compensating or equalizing taxes are not collected from competing domestic insurance companies.

In this connection said booklet shows that in the states listed below (the booklet is not clear as to certain states, hence same are not listed here) discriminatory percentage taxes on premiums are collected as follows:

State	Percentage tax on premiums of foreign insurance companies.	Percentage tax on premiums of domestic insurance companies
Ala.	2 1/4 % Life; 1 1/2 % Fire	1%, less tax reduc. inv.
Ariz.	2%	0
	2% Life, A & H;	
	2% Surety and Bond	0
Colo.	2%. No tax if over 50% of assets inv. in Colo. Bonds, etc.	Money on deposit, etc., reduce tax to 0%.
Conn.	Reciprocal, except Co's of other Co's pay 2%.	0
Fla.	3% on W. C.; 2% on other ins.	0
Ill.	2%	0
Ind.	3%, less losses.	0
Iowa	2 1/4 %	0
Kan.	2%	0
Ky.	2%	2% on W. C. only
Me.	2%	0
Mass.	2%, except 1/4 of 1% on net value of Life Ins.	1/4 of 1% on net value of Life Insurance.
Mich.	3% on Fire, Marine and Auto; 2% Cas. and Life	0
Miss.	3%, except 2 1/4 % on Life, H. & A. (Less tax inv.)	Diff. between ad val. tax and 50% foreign Co. tax
Neb.	2%	0
N. H.	2%	0
N. J.	2%	0
N. M.	2%	0
N. Dak.	2 1/4 %	0
Ohio	2 1/4 %	.002% on Cap. & Sur. Opt. 8 1/3 times Ohio prem.
Okla.	4%, except on fraternals	0
Ore.	2 1/4 %	0
Pa.	2%	0
S. C.	5 1/2 % on W. C.; 1% on other insurance.	.008%
S. Dak.	2 1/4 %	1%
Tenn.	2 1/4 %	0
Wash.	2 1/4 %	1%
W. Va.	2%	0

The above list was set forth in respondent's brief in both the trial court and Circuit Court of Appeals, and its correctness was not questioned in petitioner's briefs or oral

arguments or in its petition for rehearing in the Circuit Court.

The Philadelphia Fire Association Case

In determining the meaning and validity of the constitutional and statutory provisions of this state, heretofore quoted, especially those that impose an annual two per cent tax on the Oklahoma premiums of foreign insurance companies, but not on the like premiums of competing domestic insurance companies, the intention of the Oklahoma Constitutional Convention and Legislature in respectively adopting and enacting the same should be ascertained.

In this connection it must be presumed that said Convention and Legislature in adopting and enacting said provisions in 1907 and 1909 were cognizant of the fact that this Court had theretofore held in the case of *Philadelphia Fire Association v. New York* (1886), 119 U. S. 100, 30 L. ed. 342, that a state law imposing an annual tax on the premiums collected in said state of a foreign insurance company, but not on the like premiums of a competing domestic insurance company, did not violate the Fourteenth Amendment of the Constitution of the United States if *said tax was imposed for the privilege of entering the state and doing business therein during the succeeding license year.*

Inasmuch as said case was (and still is) the only decision of this Court on said question, it must be presumed that the principles of law announced therein were followed

in the adoption and enactment of the constitutional and statutory provisions involved here. In fact, it is inconceivable that the Oklahoma Constitutional Convention and 1909 Legislature intended to impose said annual two per cent premium tax in such a way as to make same unconstitutional, when a way had been pointed out in said decision to make said tax constitutional.

The Philadelphia Fire Association case was cited with approval in *Home Indemnity Company of New York v. O'Brien* (C. C. A. Mich., 1939), 104 Fed. (2d) 413, apparently as authority for the proposition that a state has the power, by the passage of retaliatory legislation,

"to protect its own domestic insurance companies doing business in other states from burdens, prohibitions and limitations placed upon them by taxes, license fees, deposits and similar measures."

In this connection it will be noted that if state laws providing for the payment by foreign insurance companies of annual discriminatory privilege taxes are illegal, as contended by petitioner, it would be wholly unnecessary for other states to enact retaliatory legislation in effect providing that insurance companies domiciled in states having such discriminatory laws and desiring to do business in said "other states," must, in order to do business therein, pay similar privilege taxes in said "other states."

The New York Life Insurance Company Case

The pertinent Oklahoma constitutional provisions, as well as Section 10478, O. S. 1931 (Section 6687, C. O. S. 1921),

supra, were construed in the case of *New York Life Insurance Company v. Board of Commissioners of Oklahoma County* (Okla. 1932), 155 Okla. 247, 9 Pac. (2d) 936, referred to as inapplicable on page 19 of the petition for writ of certiorari herein. In said case it was held that the annual two per cent tax on the Oklahoma premiums of the New York Life Insurance Company was a valid "license fee, or privilege tax" charged said company "for the right or privilege to do business" in Oklahoma.

In this connection respondent, for the information of the Court, quotes certain material parts of said decision, as follows:

"Percentage on the income or receipts, by agents of foreign insurance companies, imposed for the privilege of carrying on their business, is not a tax within a constitutional sense. Desty, American Law Taxation, p. 229 * * *.

"The state reserves the right to prohibit foreign insurance companies from doing business within the state, and it may regulate, prescribe, and impose any burdens, terms, or conditions it chooses, reasonable or unreasonable, in giving its assent to such corporation to engage in business within the state. *Hebring v. Lee, State Ins. Com.* (Ore.), 269 Pac. 236 * * *.

"In the case at bar no lump sum is designated as a license fee or privilege tax for the purpose of transacting business within the state. It seems manifest that a certain per cent of the premiums collected by a foreign insurance company is an equitable mode of determining what burdens, license fee, or privilege tax should be charged to said corporation for the right or privilege to do business within the state."

When the Supreme Court of Oklahoma held in the above case that the payment by a foreign insurance company of said annual fees, *including said annual two per cent premium tax*, was not in lieu of ad valorem taxes on its personal property, and that such a company, like a competing domestic company, must pay ad valorem taxes on its personal property in this State, it was undoubtedly aware that said premium tax (there being no like or equalizing or compensating tax paid by competing domestic insurance companies) *discriminated heavily against foreign insurance companies*. Therefore, unless said court was of the opinion that said annual two per cent premium tax was *a tax or fee for the right or privilege of entering Oklahoma and doing business therein during the year for which same was paid*, it would not have considered or treated said tax as constitutional and valid. It was, therefore, necessary and not merely *dicta* for the court to hold, as it did hold, that said annual two per cent premium was charged

"for the right or privilege to do business within the state."

The Hanover Fire Insurance Company Case

Inasmuch as the case of *Hanover Fire Insurance Company v. Carr, Treasurer (formerly Harding, Treasurer)*, 272 U. S. 494, 71 L. ed. 372, is the decision upon which petitioner places its chief reliance in its petition for writ of certiorari, same will be fully discussed by respondents. However, before doing so we desire to call attention to the salient fact, as will

hereinafter be shown, that while said case held that the net receipts tax of Illinois, as construed by the Illinois Supreme Court in 1923, was discriminatory and invalid, it in effect held that the 1919 two per cent annual gross premium tax of Illinois (same being essentially the same as the tax involved here) was a tax paid for the privilege of doing business in said state for the ensuing year, and was hence valid even though discriminatory.

Moreover, petitioner wholly fails to consider in its petition for writ of certiorari and supporting brief, the pertinent fact that while the 1919 act was passed long after the Hanover Fire Insurance Company first entered the State of Illinois, the annual two per cent premium tax levied thereby, even though clearly discriminatory, was treated as valid by this Court as to said company under the theory that same was a tax for the privilege of annually entering said state and doing business therein during the succeeding license year.

In this connection said case reveals that in 1869 the State of Illinois passed a law relating to the domestication of foreign insurance companies in Illinois. Section 30 of said Act, which was immaterially amended in 1879, operated to annually levy the regular ad valorem tax on the net receipts of such companies during the prior year. Section 22 of said 1869 law provided for the admission and regulation of such a company, required local agents thereof to secure annually certificates of authority from the director of trade of said state showing that the company had complied with

the law "which applied to it," and also required the company to pay \$30.00 for its charter, \$10.00 for its annual statement, and \$2.00 for each agent's certificate of authority. The payment of the net receipts tax provided for in Section 30 was in no way a condition precedent for said company to enter the State of Illinois and to do business therein. No similar tax was required of domestic corporations, but both foreign and domestic corporations were required to pay the regular ad valorem tax upon their real and personal property.

The computation of the regular ad valorem tax in Illinois on personal property was in theory upon fifty per cent of the actual value thereof, but as a matter of practice said fifty per cent was debased to thirty per cent, hence personal property in Illinois was actually only taxed on thirty per cent of its actual value. Said net receipts tax, being considered a tax upon personal property, was debased to thirty per cent of said net receipts and said ad valorem tax computed thereon. This procedure was followed from 1869 to 1923, when the Supreme Court of Illinois held that said ad valorem tax should be levied upon the full amount, rather than upon said debased amount, of the net receipts of a foreign insurance company.

Prior to said holding *and in the year 1919*, the Legislature of Illinois passed a law requiring foreign insurance companies to pay an annual state tax for the privilege of doing an insurance business in said state equal to two per

cent of the gross amount of the premiums received therein during the preceding year, but said law did not repeal or supersede said prior net receipts tax law.

It is significant to note that this annual two per cent premium tax, which was levied for a purpose similar to that of the tax involved here, has never been protested by foreign insurance companies doing business in Illinois, and it is specifically stated in the Hanover case that the Hanover Fire Insurance Company had paid said tax.

It was also the contention of the Illinois court in its said 1923 decision that while payment of said annual net receipts tax was not a condition precedent for said company to enter said state, that since its agents were required by Section 22 of the 1869 Act to procure annually from the insurance superintendent a certificate of authority stating that the company had "complied with all the requirements" of said Act, and since payment of said net receipts tax was a part of said requirement, said tax was levied as compensation for the privilege of continuing "to do business in said state," and hence valid, even though discriminatory.

The Hanover Company did not object to the payment of said net receipts tax until the Supreme Court of Illinois held in 1923, as aforesaid, that same should be computed upon the actual amount of its net receipts and not upon the debased value thereof. After this decision said company refused to pay the full amount of said receipts tax and filed action to enjoin the collection of a tax warrant therefor.

This Court held that said tax, as so computed, was discriminatory and invalid, but in effect also held that as long as the same was computed on the debased value of said receipts, as was other personal property, it was not discriminatory or invalid.

In so holding the Court, after citing cases to the effect that a state cannot, as a condition precedent to the admission of a foreign corporation to do business therein, validly require the corporation to surrender rights guaranteed to it by the Federal Constitution, such as a right derived under the Commerce Clause or the right to remove an action brought against it to a Federal Court, had this to say in relation to the validity of state taxes under the Fourteenth Amendment of the Constitution of the United States:

"In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same ilk."

"What, therefore, we have to decide here is whether the application of section 30 can be one of the conditions upon which the insurance company is admitted to do business in Illinois, or whether under the Law of 1919 the authority granted by the department of trade and commerce for which the company paid two per cent of gross premiums received the previous year by it put it upon a level with domestic insurance companies doing business of the same character.

*"It is plain that compliance with section 30 is not a condition precedent to permission to do business in Illinois. The State Supreme Court concedes this, * * *."*

By the above language this Court in effect held that while said net receipts tax, as construed by the Illinois court in 1923, was an "occupation tax" or a "privilege tax," same was not paid "for the license or privilege to do business in the state," and that the Illinois court conceded compliance with said Section 30, to-wit, payment of said net receipts tax,

"is not a condition precedent to permission to do business in Illinois."

This Court also in effect held that said 1919 two per cent annual gross premium tax, same being analogous to the tax involved here, was a tax for the right or privilege of doing business in Illinois for the ensuing year and hence valid.

This Court also held that while the license construed in the Greene case, hereinafter mentioned, "was indefinite," the license construed in the Hanover case "must be renewed from year to year." This is shown by the following excerpt from said case, to-wit:

"In the Greene case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens."

The above quoted language is in harmony with the holding in *Philadelphia Fire Association v. New York, supra*, and reveals that the licensing provisions of laws, such as the Illinois law construed in the Hanover case, only permit a foreign insurance company to do business in the licensing state for one year. It was probably for this reason that the 1919 two per cent annual gross premium tax law of Illinois, which, as stated in the Hanover case,

" * * * provided that each non-resident corporation licensed and admitted to do an insurance business in the state should pay an annual state tax for the privilege of so doing, equal to two per centum of the gross amount of premiums received during the preceding calendar year on contracts covering risks within the state after certain reductions; * * *, "

was held or treated as valid by this Court, and that said annual two per cent gross premium tax, both before and since said decision, has been paid without question by foreign insurance companies doing business in Illinois.

The Shaffer Oil & Refining Company Case

The Hanover case was followed in the case of *Sneed, Treasurer v. Shaffer Oil and Refining Company et al.* (C. C. A. 8th Cir., 1929), 35 Fed. (2d) 21, also relied upon by petitioner in its petition for a writ of certiorari, wherein it

is held that a law of Oklahoma then enforced by the Oklahoma Corporation Commission, levying an annual discriminatory corporation license tax upon foreign corporations which had theretofore received (like the railway company in the Greene case, *supra*), an "indefinite license" to do business in Oklahoma from the Oklahoma Secretary of State, was invalid under the Fourteenth Amendment of the Constitution of the United States. Said case is not in point here since a foreign insurance company receives no license whatsoever from the Oklahoma Secretary of State (See *State v. Prudential Ins. Co. et al.*, 180 Okla. 191, 68 Pac. [2d] 852), and the only license or permit it receives is a license from the State Insurance Commissioner to do business in Oklahoma for one license year.

~~The action involved here is, in reality, a suit against the State of Oklahoma by a citizen of another state, and hence brought in violation of the 11th Amendment of the Constitution of the United States for the reason that said state has not consented to be sued for the recovery of taxes paid under protest except in its own courts.~~

The above proposition, which is supported by the first paragraph of the conclusions of law (R. 31) of the trial court herein, should be considered by this Court in determining whether or not it will issue the writ of certiorari prayed for by petitioner. In this connection it will be noted that Section 12665, Oklahoma Statutes, 1931, under the purported

authority of which this action was brought (paragraph 1 of Stipulation of Facts—R. 22), provides in part that all suits to recover taxes paid under protest:

"shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

That an action filed against a state officer to recover taxes paid under protest, as provided in Section 12665, is, in reality, a suit against the state, and that in said section the state waived its sovereign immunity from such a suit *in courts of the State of Oklahoma*, is shown by the case of *Antrim Lumber Company v. Sneed, State Treasurer* (Okla. 1935), 175 Okla. 47, 52 Pac. (2d) 1040, wherein the Supreme Court of Oklahoma held in the third paragraph of the syllabus, as follows:

"In this jurisdiction a suit for the recovery of illegal taxes is deemed to be in effect a suit against the state and consent to the maintenance of such a suit has been granted by section 12665, O. S. 1931, * * *."

In the body of the opinion it is stated:

"The case of *Atchison, T. & S. F. Ry. Co. v. O'Connor*, *supra* (223 U. S. 280, 56 L. ed. 436), together with *Erskine v. Van Arsdale*, 15 Wall. 75, 21 L. ed. 63, and the *Virginia Coupon Cases*, 144 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. ed. 185, are authority for the individual liability of a

treasurer to repay taxes paid to him involuntarily and under protest when the tax is exacted under an unconditional statute, *but are inapplicable where the suit is against the treasurer in his official capacity and thus is in effect a suit against the state.* As has been said in *Smith v. Reeves*, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. ed. 1140:

“An action against a state treasurer *in his official capacity*, which is in effect to compel the state, through him, to perform its promise to return to taxpayers money that may be adjudged to have been taken under an illegal assessment, is in substance an action against the state itself, within the meaning of U. S. Const., Eleventh Amend.”

The above decision of the Supreme Court of Oklahoma, construing the meaning of Section 12665, *supra*, is binding on this Court.

By an examination of said section it will be found that the State of Oklahoma waived its common law immunity from suit, as provided therein, for the recovery of taxes paid under protest. However, in view of the fact that it is a primary rule of statutory construction, as stated in 59 C. J. 1121, that

“statutes in derogation of sovereignty should be strictly construed in favor of the state, so that its sovereignty may be upheld and not narrowed or destroyed, and should not be permitted to divest the state or its government of any of its prerogatives, rights, or remedies, unless the intention of the Legislature to effect this object is clearly expressed,”

and since in Section 12665 the Legislature expressly provided that suits filed under authority thereof

“shall have precedence,”

in the courts in which same are filed, and that said courts
“shall render judgment”

in the manner prescribed therein, which procedural requirements the Oklahoma Legislature had authority to prescribe for actions in state courts, but not in federal courts, it is not conceivable that when the Legislature enacted said section it intended to authorize the filing of actions to recover protested tax payments in federal courts. In support of our above conclusion attention is called to the principles of law announced in the cases of *Smith v. Reeves, supra*, 178 U. S. 436, 40 L. ed. 1140, and *Chandler v. Dix*, 194 U. S. 590, 48 L. ed. 1129.

While it is true that Section 12663 has been considered by the Federal courts, such as in decisions of this Court reviewing decisions of the Oklahoma Supreme Court construing said section, or in injunction actions predicated upon the proposition that said section did not afford an adequate remedy at law, we have been unable to find any case going into the question as to whether the State of Oklahoma, by the passage of said section, waived its immunity under the Eleventh Amendment from being sued in the federal courts.

That this action is a suit against the State is further shown by the fact that while the protested payment sued for here is not deposited “in the General Revenue Fund of the State Treasury” (paragraph 1 of Stipulation—R. 22), it is deposited under the provisions of 62 O. S. 1941, sections 74 and 75, in the Insurance Commissioner’s Protest Fund or Account in the State Treasury. It will thus be noted that

if petitioner recovers judgment herein same must be paid from moneys deposited in the treasury of this State. It was probably for this reason that the Supreme Court of Oklahoma, in construing Section 12665, held in the third paragraph of the syllabus of the Antrim Lumber Company case, as aforesaid, that:

“In this jurisdiction a suit for the recovery of illegal taxes is deemed to be in effect a suit against the state and consent to the maintenance of such a suit has been granted by section 12665, O. S. 1931, * * *.”

In this connection it will be noted that in the body of the opinion of said case the court construed said section as authorizing the filing of an action by a protesting taxpayer against the proper State tax collecting officer,

“to compel a refund of the alleged illegal tax to be made to it *out of the state treasury*,”

to-wit, out of said officer’s protest fund or account in the State Treasury. Such an action is, in effect, a mandamus action. This, coupled with the fact that State courts, but not Federal courts, have jurisdiction in mandamus actions, supports our contention that in Section 12665 the State intended to waive its common law immunity from suit in the courts of the State, but not to waive its immunity under the Eleventh Amendment from being sued in courts of the United States.

Before concluding this proposition of our brief, respondent desires to again call attention to the case of Atchison, Topeka and Santa Fe Railway Company v. O’Connor. By an examination of said case it will be found that same is brought

against O'Connor personally, and not as an officer of the State of Colorado. In this connection it will be noted that in our quotation from the Antrim Lumber Company case the court, in referring to the O'Connor case and to another cited case, held that the same:

"are authority for the individual liability of a treasurer to repay taxes paid to him involuntarily and under protest when the tax is exacted under an unconstitutional statute, but are inapplicable where the suit is against the treasurer in his official capacity and thus is in effect a suit against the state."

**The matter in controversy does not arise under
the Constitution or laws of the United States.**

If it be held that while this suit is, in reality, a suit against the State, the State by Section 12665, *supra*, not only waived its common law immunity from suit in its own courts, but its immunity under the Eleventh Amendment from being sued in the federal courts, respondent desires to call attention to the fact that in such case this Court does not have jurisdiction of the subject-matter of this action and hence should not issue the writ of certiorari prayed for by petitioners; this for the reason that while the amount sued for in petitioner's original complaint exceeds \$3,000.00, the State is not a citizen within the meaning of the diversity of citizenship provision and the matter in controversy does not arise under the constitution or laws of the United States. This proposition is supported by the second paragraph of the conclusions of law (R. 31) of the trial court herein.

In this connection it will be noted that it is not contended by petitioner that any law of the United States is involved in this case, its sole contention being that the action set forth in its original complaint arises under the Fourteenth Amendment of the Constitution of the United States for the reason that the constitutional and statutory provisions of Oklahoma under which the taxes involved here were collected, *as said provisions are construed by petitioner*, violate that part of said amendment which provides, that no state shall,

“deny to any person within its jurisdiction the equal protection of the law.”

It will also be noted, from an examination of the original complaint (R. 4-11), as well as the answer (R. 12-15) and stipulation (R. 22-26): *that there is no issue in the cause of action set forth in said complaint as to the proper construction of the Fourteenth Amendment, but that the only real or substantial issue involved therein is whether the constitutional and statutory provisions of this State, when properly construed, require a foreign insurance company to pay the annual premium taxes mentioned therein:*

- (a) as contended by petitioner, *not for the right or privilege* of entering and doing business therein during the license year for which same are paid, in which event said taxes are admittedly invalid under said amendment; or
- (b) as contended by respondent, *for the right or privilege* of entering Oklahoma and doing business therein during the license year for which same are paid, in

which event said taxes are admittedly not invalid under said amendment.

In support of respondent's position as to the jurisdictional issue above presented, attention is called to the general rule set forth in Volume 1 of Hughes' Federal Practice, page 407, sec. 551, where, under the subject "When Case Arises Under the Constitution," it is stated:

"A case arises under the Constitution of the United States when some title, right, privilege or immunity on which a recovery depends will be defeated by one construction of that constitution, or sustained by an opposite construction, or whenever the correct decision of the case depends upon the correct construction of the constitution, * * *."

In the case of *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, this Court held:

"Whether a suit is one that arises under the constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the constitution or laws of the United States. *Osborn v. Bank of the United States*, 8 Wheat. 738; *Starim v. New York*, 115 U. S. 248, 257. In *Carson v. Dunham*, 121 U. S. 421, it was ruled that it was necessary that the construction either of the constitution or some law or treaty should be directly involved in order to give jurisdiction, * * *."

C O N C L U S I O N

In consideration of the argument and authorities presented herein respondent respectfully asks the Court to decline to issue the writ of certiorari prayed for by petitioner.

Respectfully submitted,

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Attorney General of Oklahoma;

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September, 1943.

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No. 235

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1943

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

vs.

JESS G. READ, Insurance Commissioner
for the State of Oklahoma,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE TENTH CIRCUIT

Brief of Respondent

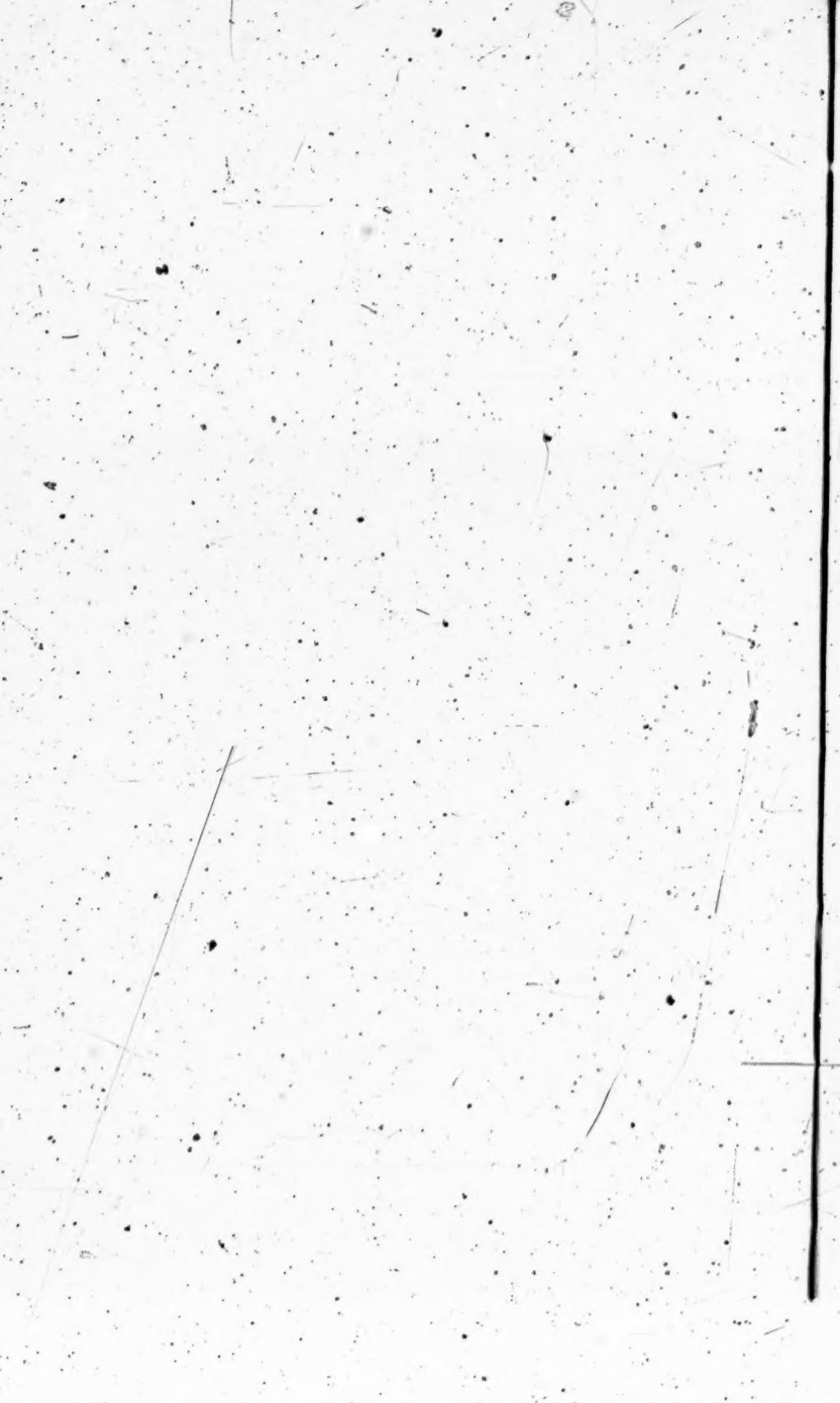
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January, 1944



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In The
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GREAT NORTHERN LIFE INSURANCE COMPANY,
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for the State of Oklahoma,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE TENTH CIRCUIT

Brief of Respondent

STATEMENT OF THE CASE

The statement of the case which appears on pages 2 to 8 of petitioner's brief is substantially correct. However, since the reference in the second paragraph thereof to petitioner's original entrance in Oklahoma in 1922 is

(2)

susceptible of being construed as a statement concurred in by respondent that the Great Northern Life Insurance Company was

- (a) then licensed to do business in Oklahoma for a longer period than the license year ending February 28, 1923, and
- (b) then a citizen in Oklahoma for a longer period than said license year.

we desire to call attention to the sixth paragraph of respondent's answer (R. 11-12) which clearly shows to the contrary.

Moreover, since the chief portion of petitioner's statement of the case consists of an incomplete abstract of the "Stipulation of Facts" (R. 20-23) on which this case was tried, respondent respectfully asks the court to carefully consider said stipulation and the exhibits attached thereto.

Said stipulation reveals that there is no issue in the cause of action set forth in petitioner's complaint as to the proper construction of the 14th Amendment, but that the only real or substantial issue involved in petitioner's complaint is whether the pertinent constitutional and statutory provisions of Oklahoma, when properly construed, require a foreign insurance company to pay annual premium taxes:

- (a) as contended by petitioner, *not for the right or privilege* of entering Oklahoma and doing business therein during the license year for which same are paid, in which event said taxes are *admittedly invalid* under said amendment, or

(3)

- (b) as contended by respondent, for the right or privilege of entering Oklahoma and doing business therein during the license year for which same are paid, in which event said taxes are admittedly not invalid under said amendment.

FIRST PROPOSITION

THE OBJECTION THAT THE UNITED STATES DISTRICT COURT DID NOT HAVE JURISDICTION OF THIS ACTION WAS RAISED IN PARAGRAPH 2 OF RESPONDENT'S ANSWER.

On pages 12 and 13 of petitioner's brief the converse of the above proposition is presented, it being specifically stated that

"no point was made in the defendant's answer that the Federal Court did not have jurisdiction of either the person or of the subject matter",

However, by an examination of said answer (R. 11-13) it will be noted that the above issue was raised in Paragraph 2 thereof, as follows:

"The complaint fails to state a claim against defendant upon which relief may be granted.",

it being our position, as will hereinafter be shown, that the respondent, Jess G. Read, is not being sued personally but as

"Insurance Commissioner of the State of Oklahoma."

and that he is being so sued (same being, in reality, a suit against the State) under the purported authority of Section 12665, O. S. 1931 (quoted Appendix IV of petitioner's brief), in which section the State consented to be sued in courts of Oklahoma but not in courts of the United States.

That said proposition is properly raised under Paragraph 2, *supra* (same being analogous to a general demurrer), is shown by the case of *Scully v. Bird*, 209 U. S. 481, 52 L. ed. 899, wherein a former decision of the Supreme Court of the United States was quoted with approval which held that when an action was not filed against a named state *but against an officer thereof* who

"desires to plead an exemption by reason of his *representative character*; he does not raise a question of jurisdiction in its proper sense . . . But whether this be a question of jurisdiction or not, we think it should be raised either by demurrer to the bill or by other pleadings in the regular process of the cause."

The above holding is in harmony with the general rule which appears in 25 Corpus Juris 783, same being as follows:

"A contention that a federal court is without jurisdiction of an action against a state officer for the reason that the action is in effect against the state *should be raised by demurrer or other pleading in the regular progress of the cause*, * * *."

Moreover, that part of Rule 12(h) of the Federal Court Rules for District Courts of the United States

which relates to lack of jurisdiction of the subject matter of an action, was construed in the case of *Page v. Wright* (C.C.A. 7th Cir.-1940), 116 Fed. (2d) 449, the first and second paragraph of the syllabus being as follows:

"The duty devolves upon federal court at any time jurisdictional question is presented to proceed no further until that question is determined.

"*Jurisdiction cannot be conferred upon federal court by agreement, consent, or collusion of the parties, whether contained in their pleadings or otherwise, and a party cannot be precluded from raising jurisdictional question by any form of laches, waiver, or estoppel.*"

In the body of the opinion it is stated that

"the phraseology contained in 12(h) 'jurisdiction of the subject matter,' and that in 12(b)(1) 'lack of jurisdiction over the subject matter' in each instance includes 'diversity of citizenship.'"

Therefore, if this cause of action is, in reality, a suit against the State of Oklahoma to which consent has not been given, or if such consent was given but said cause of action did not arise under the constitution or laws of the United States (as will hereinafter be shown), the trial court properly held (Paragraphs 1 and 2 of conclusions of law - R. 28) that by virtue of the 11th Amendment of the Constitution of the United States and 28 U. S. C. A., Section 41, as amended, it was without jurisdiction of this action, and this is true even though it be conceded that the instant objection was not raised

in respondent's answer and that by Paragraph 5 of said answer respondent admitted the allegations contained in Paragraph 1 of the complaint.

SECOND PROPOSITION

THIS ACTION INVOLVED HERE IS, IN REALITY, A SUIT AGAINST THE STATE OF OKLAHOMA BY A CITIZEN OF ANOTHER STATE, AND HENCE BROUGHT IN VIOLATION OF THE 11th AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES FOR THE REASON THAT SAID STATE HAS NOT CONSENTED TO BE SUED FOR THE RECOVERY OF TAXES PAID UNDER PROTEST EXCEPT IN ITS OWN COURTS.

The converse of the above proposition is presented on pages 12 to 25 of petitioner's brief. Said proposition, however, is supported by the first paragraph of the "Conclusions of Law" (R. 28) of the trial court herein (not referred to by the Circuit Court of Appeals) and hence said paragraph should be considered by this court in determining whether the trial court had jurisdiction herein.

This Action Is A Suit Against The State of Oklahoma

In connection with the above proposition it will be noted that Section 12665, Oklahoma Statutes 1931 (Section 9971, C. O. S. 1921), under the purported authority of which petitioner admittedly (see page 21 of petitioner's brief) brought this action, is as follows:

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the law provides no appeal, the aggrieved

person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of 30 days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes, until the final determination of such suit. *All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected; as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor.*"

That an action filed against a State officer to recover taxes paid under protest, as provided in Section 12665, is, in reality, a suit against the State, and that in said section the State of Oklahoma waived its sovereign immunity from such a suit in courts thereof, is clearly shown by the case of *Antrium Lumber Company v. Sneed, State Treasurer* (Okla.-1935), 175 Okla. 47, 52 Pac. (2d) 1040 (stressed by respondent in both the trial and circuit courts but not referred to in petitioner's brief), wherein

the Supreme Court of Oklahoma held in the third paragraph of the syllabus, as follows:

"In this jurisdiction a suit for the recovery of illegal taxes is deemed to be in effect a suit against the state and consent to the maintenance of such a suit has been granted by section 12665 O. S. 1931 (Sec. 9971, C. O. S. 1921), and thereby the taxpayer is provided with an adequate, speedy, and exclusive remedy in all cases where the illegality of the tax is alleged to arise by reason of some action from which the law provides no appeal."

The above decision of the Oklahoma Supreme Court construing the meaning of Section 12665, *supra*, is binding on this court. By an examination of said section, as so construed, it will be found that suits filed thereunder to recover taxes paid under protest (such as the taxes involved here) are expressly held to be suits against the State, and that it is also held that under the provisions of said section the State waives its common law immunity from being sued in its own courts for the recovery of such taxes.

That this action is a suit against the State is further shown by the fact that while the protested payment sued for here is not deposited "in the General Revenue Fund of the State Treasury" (Paragraph 1 of stipulation - R. 20), it is deposited under the provisions of 62 O. S. 1941 §§ 74 and 75, in the Insurance Commissioner's Protest Fund or Account in the State Treasury. It will thus be noted that if petitioner recovers judgment herein same must be paid from moneys deposited in the Treasury of this State.

In this connection the Oklahoma court in the Antrium Lumber Company case construed Section 12665 as authorizing the filing of an action by a protesting taxpayer against the proper State tax collecting officer

"to compel a refund of the alleged illegal tax to be made to it *out of the state treasury.*"

to-wit, out of said officer's protest fund or account in the State Treasury.

**The State of Oklahoma Did Not Waive Its Immunity
From Suit In Federal Courts**

Nothing was said in the Antrium Lumber Company case as to the right of a taxpayer to file an action in the Federal Court to recover taxes paid under protest, under authority of Section 12665, *supra*. However, in view of the fact that it is a primary rule of statutory construction that

"statutes in derogation of sovereignty should be strictly construed in favor of the state"

(59 C. J. 1141), which rule was followed by the Supreme Court of Oklahoma in the case of *Hawks, et al., v. Walsh, et al.*, 177 Okla. 564, 61 Pac. (2d) 1109 wherein it is stated

"It is universally held that statutes permitting a state to be sued are in derogation of its sovereignty and will be strictly construed."

and since in Section 12665 the Legislature expressly provided that suits filed under authority thereof "shall have precedence"

in the courts in which the same are filed, and that said courts

"shall render judgment"

in the manner prescribed therein, *which procedural requirements the Oklahoma Legislature had authority to prescribe for actions in State courts but not in Federal courts*, it is not conceivable that when the Legislature enacted said section it intended to authorize the filing of actions to recover protested tax payments in Federal courts.

A somewhat similar statute of the State of California was held by this court in the case of *Smith v. Reeves*, 178 U. S. 436-41, 44 L. ed. 1140-43, to not authorize a suit against said State in Federal courts. In this connection the court held:

"It is quite true the State has consented that its Treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the State Board of Equalization. But we think that it has not consented to be sued except in one of its own courts. This is not expressly declared in the statute, but such, we think is its meaning. The requirement that the aggrieved taxpayer shall give notice of his suit to the Comptroller, and the provision that the Treasurer may at the time he demurs or answers demand that the action be tried in the Superior Court of the County of Sacramento, indicate that the State contemplated proceedings to be instituted and carried to a conclusion only in its own judicial tribunals."

The principles of law announced in the Smith case.

supra, were followed in the case of *Chandler v. Dix*; 194 U. S. 590-91, 48 L. ed. 1029-31, wherein it is held:

"The plaintiff relies upon the Public Acts of Michigan, 1899, act 97, adding § 144 to the general tax law of 1893. That act provides that 'the Auditor General shall be made a party defendant to all actions or proceedings instituted for the purpose of setting aside any sale or sales for delinquent taxes on lands held as state tax lands, or which have been sold as such, or which have been sold at annual tax sales, or for purpose of setting aside any taxes returned to him and for which sale has not been made.' But we are of opinion that if the forgoing words otherwise would apply to this case they should not be construed as expressing a waiver by the State of its constitutional immunity from suit in a United States Court. The provisions indicate that the Legislature had in mind only proceedings in the courts of the State. A copy of the complaint is to be served upon the prosecuting attorney, who is to send a copy thereof within five days to the Auditor General, and this is to be in lieu of service of process. It then is left to the discretion of the Auditor General to cause the Attorney General to represent him, and it is provided that in such suits no costs shall be taxed. These provisions with regard to procedure and costs show that the statute is dealing with a matter supposed to remain under state control. Of course, a taxpayer denied rights secured to him by the Constitution and laws of the United States, and specially set up by him, could bring the case here by writ of error from the highest courts of the State. But the statute does not warrant the beginning of a suit in the Federal court to set aside the title of the State. *Smith v. Reeves*, 178 U. S. 436, 445."

By an examination of petitioner's brief it will be found that the two cases above cited are not referred to, although the earlier case of *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 38 L. ed. 1041, is cited (petitioner's brief 22-24) as holding contrary to respondent's position here. However, it will be noted that the Texas Statute involved in the *Reagan* case had not theretofore been construed by the Supreme Court of Texas as authorizing a suit against the State and that this court expressly stated (154 U. S. page 392) that the cause of action involved therein could not

"in any fair sense be considered a suit against the State."

It will also be found that on pages 23 and 24 of petitioner's brief the *Reagan* case is cited as authority for the proposition that

"whenever a citizen of a state can go into the courts of the state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense."

That this rule is not applicable when the action is directly or in effect against a sovereign State is clearly shown by the principles of law announced by this court in the *Smith* and *Chandler* cases, *supra*, wherein it was held that under the authorizing statutes involved therein the States of California and Michigan could be sued, respectively, in their own courts but not in Federal courts.

While it is true that Section 12665 has been con-

sidered by Federal courts, such as in decisions of this court reviewing decisions of the Oklahoma Supreme Court construing said section, and in injunction actions predicated upon the proposition that said section did not afford an adequate remedy at law, we have been unable to find any case going into the question as to whether the State of Oklahoma, by the passage of said section, waived its immunity under the 11th Amendment from being sued in Federal courts.

It will also be noted that an action, such as is authorized by Section 12665, is, in effect, a mandamus action. This, coupled with the fact that State courts but not Federal courts have jurisdiction in mandamus actions, supports our contention that in said section the State intended to waive its common law immunity from suit in courts of the State but not to waive its immunity under the 11th Amendment from being sued in courts of the United States.

That Federal courts do not have jurisdiction in actions "in the nature of mandamus" is admitted in the record of the "Pretrial Conference and Hearing" (R.-16), wherein the trial court stated in reference to petitioner's alternative prayer for

"a decree in the nature of mandamus, commanding defendant to deliver to plaintiff, or cause to be repaid to it, the sum of eight thousand one hundred ninety-eight and 31/100 (\$8,198.31) dollars."

that "I have no authority to issue a mandamus," to which Mr. Johnson, the attorney for petitioner, replied "We admit that * * *."

It was also stated in said pretrial conference and hearing (R.-15) that Section 12665 did not require taxes sought to be recovered thereunder to be paid "under coercion and duress" but only under protest (the payment under protest involved here being both alleged and admitted), whereupon the trial court stated to the attorneys, respectively, of respondent and petitioner that:

"Then, we are not concerned with the coercion and duress at all. That will be the theory of the case from now on, and he is confined to it and you are confined to it too."

It would, therefore, appear that actions for the recovery of taxes paid under coercion or duress, which are not brought under authority of a statute expressly authorizing the recovery of taxes paid under protest, are not applicable here.

THIRD PROPOSITION

THE MATTER IN CONTROVERSY DID NOT ARISE UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES.

28 U. S. C. A. § 41, as amended, defines the original jurisdiction of district courts of the United States. Said section, in so far as same is pertinent to the issues involved here, is as follows:

"The district courts shall have original jurisdiction as follows:

"(1) Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00, and

"(a) arises under the Constitution or laws of the United States, * * * or (b) is between citizens of different States, * * *."

Therefore, if it be held that while this action is, in reality, a suit against the State, the State by Section 12665, not only waived its common law immunity from suit in its own courts but its immunity under the 11th Amendment from being sued in Federal courts, respondent desires to call attention to the fact that in such case *the trial court did not have jurisdiction of the subject-matter of this action* for the reason that while the amount sued for in petitioner's original complaint, exclusive of interest and costs, exceeded \$3,000.00, the State of Oklahoma is not a citizen within the meaning of the above diversity of citizenship provision *and the matter in controversy did not arise under the Constitution or laws of the United States.*

In this connection it will be noted, that it is not contended by petitioner that the construction of any law of the United States is involved in this case, its sole contention being that the cause of action set forth in its original complaint arose under the 14th Amendment of the Constitution of the United States *for the reason that the constitutional and statutory provisions of Oklahoma under which the taxes involved here were collected, as said provisions are construed by petitioner, violate that part of said amendment which provides that no State shall*

"deny to any person within its jurisdiction the equal protection of the law."

It will also be noted from an examination of the

original complaint and the stipulation and briefs filed herein *that there is no issue* in the case at bar as to the proper construction of the 14th Amendment *but that the only real or substantial issue involved therein*, is, as aforesaid, whether the pertinent constitutional and statutory provisions of Oklahoma, when properly construed, require a foreign insurance company to pay annual premium taxes:

(a) as contended by petitioner, *not for the right or privilege* of entering Oklahoma and doing business therein during the license year for which same are paid, in which event said taxes are *admittedly invalid* under said amendment.

or

(b) as contended by respondent, *for the right or privilege* of entering Oklahoma and doing business therein during the license year for which same are paid, in which event said taxes are *admittedly not invalid* under said amendment.

In support of respondent's position as to the real jurisdictional issue above presented, attention is called to the general rule set forth in Vol. 1 of Hughes Federal Practice, page 407, § 551, where, under the subject "When Case Arises Under the Constitution," it is stated:

"A case arises under the Constitution of the United States when some title, right, privilege, or immunity on which a recovery depends will be defeated by one construction of that Constitution, or sustained by an opposite construction, or whenever the correct decision of the case depends upon the correct construction of the Constitution, and a

federal court has jurisdiction of a bill, whether original or ancillary, which raises an issue involving constitutional rights, and may decide whether a federal statute is constitutional. *If the decision of a case does not necessitate the construction of the Constitution, it cannot be said to arise under the Constitution.*"

In the case of *Cooke v. Avery*, 147 U. S. 375, 37 L. ed. 209, this court held:

"Whether a suit is one that arises under the Constitution or laws of the United States is determined by the questions involved. *If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States.* *Osborn v. Bank of the United States*, 9 Wheat. 738; *Starin v. New York*, 115 U. S. 248, 257. In *Carson v. Dunham*, 121 U. S. 421, it was ruled that it was necessary that the construction either of the Constitution or some law or treaty should be directly involved in order to give jurisdiction. * * *."

In support of the above quoted general rule from Vol. 1 of "Hughes Federal Practice" and under the sub-head set forth in the 1943 cumulative pocket part of said volume entitled "Construction of State Constitution or State Statute", the case of *Heller v. Kreider* (C. C. A. Pa. 1938) 98 Fed. (2d) 106, and the case of *Metropolitan Edison Co. v. Ickes, Admr.*, (D.C.D.C. 1938) 22 Fed. Supp. 639, are cited. Inasmuch as said cases are pertinent to the proposition involved here same are reviewed, as follows:

In the case of *Heller, et al., v. Kreider, supra*, wherein the action was brought by certain resident taxpayers to enjoin the directors of a school district from building a consolidated school house with the aid of federal funds on the ground that said construction was beyond the statutory power of the school district and said board (said action being apparently brought in the Federal court under the theory that the building of said school house would operate to deprive said taxpayers of their property without due process of law contrary to the provisions of the 14th Amendment and that hence said action arose under the Constitution of the United States), the court, in vacating the injunction granted by the trial court, held in the second paragraph of the syllabus, as follows:

"The federal court had no jurisdiction of bill by taxpayers of township to enjoin township school directors from building consolidated school house with aid of federal funds where all parties were citizens of Pennsylvania and issue in the case was statutory power of school district acting by its directors to build the school and no federal question was involved."

In the case of *Metropolitan-Edison Co. v. Ickes, Adm'r, supra*, consolidated with two other cases (affirmed by this Court 204 U. S. 541; 82 L. ed. 1517), wherein an action was brought by the plaintiff, power companies, to enjoin said administrator from advancing funds for the purpose of financing the construction of certain municipal power projects on the ground that such construction was not authorized by state law (said action being apparently brought in the Federal court

under the theory that the financing of said power projects, with resulting competition, would operate to deprive said companies of their property without due process of law contrary to the provisions of the 14th Amendment and that hence said cause of action arose under the Constitution of the United States), the Court, in granting motions to dissolve the preliminary injunction granted in said case, held in the 4th paragraph of the syllabus, as follows:

"The claim that a city has no right *under the state law* to accept a grant from a federal authority for the construction of a power project raises a question of state law which the state courts should decide."

The fact that the complaint herein does not reveal that the real and substantial issue involved in this case is based on a proper construction of the constitutional and statutory provisions of the State of Oklahoma, as aforesaid, and not of the 14th Amendment, is immaterial, since the challenge to the jurisdiction of the District Court in the case at bar was not raised by a motion to dismiss said complaint but at the conclusion of the trial under respondent's answer and the "Stipulation of Facts" herein.

In this connection it will be noted that under the principles of law announced in the "First Proposition" of this brief, the question of lack of jurisdiction of a Federal District Court of a cause of action pending before it may be raised at any time during the regular progress of the trial.

(20)

FOURTH PROPOSITION

THE ANNUAL TAX OF TWO PER CENT (SINCE APRIL 25, 1941, — FOUR PER CENT) COLLECTED ON THE OKLAHOMA PREMIUMS OF FOREIGN INSURANCE COMPANIES IS NOT AND NEVER HAS BEEN INVALID UNDER THE PROVISIONS OF THE 14th AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES BY REASON OF THE FACT THAT A LIKE TAX IS NOT COLLECTED ON THE OKLAHOMA PREMIUMS OF COMPETING DOMESTIC INSURANCE COMPANIES.

On pages 33 to 53 of petitioner's brief, the converse of the above proposition is presented. However, it is significant to note (as will hereinafter be shown under the sub-head "Gross Premium Tax Laws of other States") that while the gross premium tax laws of not less than 29 of the 48 states discriminate heavily against foreign insurance companies, none of said laws have ever been held to violate the 14th Amendment of the Constitution of the United States or any other constitutional provision.

Stipulation of Facts

Inasmuch as petitioner in the concluding paragraph of its brief in the Circuit Court of Appeals expressly stated

"If Section 1, Chapter 1a, Title 36, Page 121, Oklahoma Session Laws, 1941 (36 O. S. 1941, Section 104) is unconstitutional, since it merely amended Section 10478, O. S. 1931, which provided for a premium tax of 2%, we assume the amended section of the statutes remains in full force

and effect. Appellant has never objected to the payment of the 2% gross premium tax. In such event appellant should be entitled to a refund of one-half of the \$8,189.32 paid under protest, or the sum of \$4,094.66."

thereby in effect abandoning its attempt to recover one-half of the 4% annual tax sued for in its complaint and thus tacitly admitting that said tax when levied at 2% did not violate the 14th Amendment, and since

(a) we assume that petitioner has not abandoned its said position in the Circuit Court of Appeals from whose decision the instant appeal is taken (although petitioner's brief in this court is silent as to said position), and

(b) under the Stipulation of Facts herein (R. 20-23) it is clear that if said 2% tax is not invalid by reason of being admittedly discriminatory said 4% tax is likewise not invalid by reason of also being admittedly discriminatory,

respondent desires before proceeding with its argument herein to specifically call attention to said stipulation, which, in so far as the proposition involved here is concerned, is as follows:

"(2) That domestic life, health and accident insurance companies competing in Oklahoma with plaintiff do not pay any kind or types of taxes to said state which are not likewise paid by plaintiff, except that said competing domestic insurance companies pay an annual income tax, from which tax plaintiff is exempt, the amount of which tax, however, is approximately only 1/20th of the amount the four per cent tax would bring on the premiums collected by said companies in this state, less proper deductions.

"(3) That during the period beginning November 16, 1907, and ending December 31, 1941, the total receipts of the Oklahoma Insurance Department from the two per cent tax on gross premiums of foreign insurance companies, and from the annual entrance and agents' fees of such companies, aggregate \$25,585,107.34, while the expenses of said department during said period aggregate \$910,107.34, said expenses being approximately 3.55 per cent of said total receipts, and that since December 31, 1941, said expenses are approximately only 2 per cent of the gross receipts thereof.

"(4) That under the *uniform administrative practice* of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company desires for the first time to do business in Oklahoma, it is required, among other things, to file an application for a license therefor, same to expire the succeeding last day of February (see true and correct copy of such an application attached hereto as 'Exhibit A'), and on or before said date, to pay a tax of two per centum (since April 25, 1941 — four per centum) on all premiums, less proper deductions, which it receives in Oklahoma after it is so licensed and prior to the succeeding first day of January; and that under the *uniform administrative interpretation* by said Commissioner of the insurance laws of Oklahoma since said effective date, he has considered and treated said tax of being paid for the right or privilege of entering Oklahoma and doing business therein to and including said last day of February, and a license issued by him to said company (see true and correct copy of such a license attached hereto as Exhibit 'B') as expiring by operation

of law and its express terms on said date. It is understood that plaintiff does not agree to the correctness of the above administrative interpretation.

5) That under the *uniform administrative practice* of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company holding a license to do business in Oklahoma during any license year (same being from March 1 to and including the succeeding last day of February), desires to do business therein during the ensuing license year, it is required, among other things:

"(a) to file, on or before the last day of February of the current license year, an application for a license therefor (see true and correct copy of such an application attached hereto as 'Exhibit A'),

"(b) as a condition precedent, to have paid a tax of two per centum (since April 25, 1941 — four per centum), on all premiums, less proper deductions, which is received in Oklahoma during the preceding calendar year, and

"(c) on or before the last day of February of said succeeding license year, to pay a similar tax on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year;

"and that under the *uniform administrative interpretation* of said Commissioner of the insurance laws of Oklahoma since said effective date, he has considered and treated the tax first above mentioned as having been paid for the right or privilege of having been permitted to enter Oklahoma

and do business therein during the then current license year, the tax last above mentioned as being paid for the right or privilege of having been permitted to enter Oklahoma and do business therein during said ensuing license year, and a license issued by him to said company (see true and correct copy of such a license attached hereto as 'Exhibit B'), as expiring by operation of law and its express terms at the end of said license year. It is understood that plaintiff does not agree to the correctness of the above administrative interpretation."

Pertinent Constitutional Provisions

Sections 1 and 2, Article 19 of the Constitution of Oklahoma, are as follows:

"Section 1. *No foreign insurance company shall be granted a license or permitted to do business in this State until it shall have complied with the laws of the State, including the deposit of such collateral or indemnity for the protection of its patrons within this State as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license.*

"Section 2. *Until otherwise provided by law, all foreign insurance companies, including surety and bond companies, doing business in the State, except fraternal insurance companies, shall pay to the Insurance Commissioner for the use of the State, an entrance fee as follows:*

"Each Foreign Life Insurance Company, per annum, two hundred dollars; each Foreign Fire Insurance Company, per annum, one hundred

dollars; each Foreign Accident and Health Insurance Company, jointly, *per annum*, one hundred dollars; each Surety and Bond Company, *per annum*, one hundred and fifty dollars; and Plate Glass Insurance Company (not accident), *per annum*, twenty-five dollars; each Foreign Life Stock Insurance Company, *per annum*, twenty-five dollars.

"Unless otherwise provided by law, domestic companies excepted, each insurance company, including surety and bond companies, doing business in this State, shall pay an annual tax of two per centum on all premiums collected in the State, after all cancellations are deducted, and a tax of three dollars on each local agent."

Pertinent Statutory Provisions

Section 10478, Oklahoma Statutes 1931, was enacted in 1909, shortly after statehood, and appeared as Section 6687, C. O. S. 1921. Said section, prior to its amendment by Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941 (36 O. S. 1941 § 104), was as follows:

"Section 10478. Every foreign insurance company doing business in this state under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the insurance commission, the total amount of gross premiums received in this state within the twelve months next preceding the first day of January or since the last return of such premiums was made by such company: and shall at the same time pay the insurance commissioner an entrance fee as provided by Article XIX

of the Constitution of the State of Oklahoma, and an annual tax of two per cent on all premiums collected in this state, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said insurance commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the state. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the insurance commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this state until said taxes and penalties are fully paid, and the insurance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this state."

Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, *supra* (quoted in "Appendix II" of petitioner's brief), effective April 25, 1941; amended said Section 10478, the only material change therein being to raise said two (2%) per cent tax to four (4%) per cent.

Section 10477, Oklahoma Statutes 1931 (36 O. S. 1941 § 56), relating to the annual statements and annual licenses of both domestic and foreign insurance companies doing business in this State, was enacted as a part of the 1909 General Insurance Act of Oklahoma. Inasmuch as said section clearly reveals that a "license or certificate of authority" issued to a foreign insurance company "shall expire on the last day of February next

after its issue," respondent is quoting said section herein, as follows:

"The Insurance Commissioner shall, in December of each year furnish to each of the insurance companies authorized to do business under the provisions of this article two or more blanks in form adopted for their annual statement, and such companies shall, annually, on or before the last day of February, file in the office of the Insurance Commissioner a statement which shall exhibit its financial condition on the thirty-first day of December of the previous year and its business of that year. For good cause shown, the Commissioner may extend the time within which such statement may be filed. Every such annual statement shall be in the form of the specifications the Insurance Commissioner may require. The assets and liabilities shall be computed and allowed in accordance with the laws of this State. Such statement shall be subscribed and sworn to by the president and secretary and other proper officers. And if the Insurance Commissioner finds that the facts warrant, and that all laws applicable to said company are fully complied with, he shall issue to said company a license or certificate of authority, subject to all requirements and conditions of the law, to transact business in this state, specifying in said certificate the particular kind or kinds of insurance it is authorized to transact, and said certificate shall expire on the last day of February next after its issue."

Pertinent Conclusions of Law of the Trial Court

In relating to the proposition involved here respondent desires to call attention to the 6th, 7th and 8th paragraphs of the "Conclusions of Law" of the trial court

(R. 29-30) based on the above quoted paragraphs of the "Stipulation of Facts" herein, and the applicable law and decisions, which conclusions of law, as stated in the first paragraph of the syllabus of *In re. Chicago & N. W. R. Co.* (C.C.A. Ill., 1940), 110 Fed. (2d) 425, "are worthy of great consideration."

**Administrative Interpretation and Practice of
the Oklahoma Insurance Commissioner**

The uniform administrative interpretation and practice of the Oklahoma Insurance Commissioner of and under the foregoing constitutional and statutory provisions since the effective date of the 1909 General Insurance Act of Oklahoma (33 years), as set forth in paragraphs 2 to 5, *supra*, of the "Stipulation of Facts", are in harmony with the principles of law announced in the following cases:

Philadelphia Fire Association v. New York (1886), 119 U. S. 110, 30 L. ed. 342;

New York Life Insurance Company v. Board of Com'rs of Oklahoma County (Okla.-1932), 155 Okla. 247, 9 Pac. (2d) 936;

The Lincoln National Life Insurance Company v. Jess G. Read, Insurance Commissioner of Oklahoma, et al., (District Court, Oklahoma County, Okla.-1943), quoted in full on pages 35 to 38 of the Record herein;

Great Northern Life Insurance Company v. Read, Insurance Commissioner of Oklahoma (1943- appealed here), 136 Fed. (2d) 44, quoted in full on pages 39 to 46 of the Record herein;

Hanover Fire Insurance Company v. Carr, Treasurer, (formerly Harding, Treasurer), 272 U. S. 494, 71 L. ed. 372.

which cases are hereinafter discussed.

That said administrative interpretation and practice should not be disturbed "unless clearly wrong," is shown by the case of *United States v. La Motte*, 67 Fed. (2d) 788, wherein the 4th paragraph of the syllabus is, as follows:

"Construction of statute by Executive Department charged with its administration, although not binding, will be respected by the court if question is doubtful or ambiguous and will not be disturbed unless clearly wrong."

However, in order that the court may clearly understand said interpretation and practice, both as to the issuance of an original license and of licenses for succeeding years, the following explanation is set forth:

ISSUANCE OF ORIGINAL LICENSE. From an examination of (a) the constitutional and statutory provisions heretofore quoted, (b) the stipulation of facts herein, (c) the court decisions above mentioned, and (d) the uniform administrative interpretation and practice of the State Insurance Department since the effective date of the 1909 General Insurance Act, it appears that when a foreign insurance company desires, *for the first time*, to enter the State of Oklahoma and to do business therein, it is required:

- (a) to file an application for a license to do business in the State to and including the next succeeding last day of February (see

(30)

form of "Agreement and Application for License" on page 22 of record).

- (b) to file the data required by Section 10474, O. S. 1931 (36 O. S. 1941 § 101);
- (c) to deposit the collateral required by law;
- (d) to pay an "entrance fee" of from \$25.00 to \$200.00;
- (e) to pay, on or before the next succeeding last day of February (see "Exception" in the Appendix hereof), a tax of two per cent (now four per cent) on all premiums, less proper deductions, which it received in the State after it enters the same and prior to the next succeeding first day of January *for the privilege of so entering Oklahoma and doing business therein from the date it so enters to and including the next succeeding last day of February*, and
- (f) to agree to pay "all such [valid] taxes and fees as may at any time be imposed by law or act of the legislature."

When the requirements set forth in paragraphs (a), (b), (c), (d), (e) and (f), *supra*, have been met, the company is issued a license (see form of license on page 23 of record) entitling it to enter Oklahoma and do business therein from the date of said license to and including the next succeeding last day of February. Said license remains in effect until said date, that is, unless a refusal of said company to pay valid taxes or fees imposed upon it "by law or act of the Legislature," such as a refusal to pay valid ad valorem taxes on its real or personal property, "shall work a forfeiture

of such license" as provided in Section 1, Article 19, *supra*.

ISSUANCE OF LICENSES FOR SUCCEEDING YEARS. Said constitutional and statutory provisions, stipulation of facts, decisions, and administrative interpretation and practice, also reveal that if and when a foreign insurance company, which has been permitted to enter the State and to do business therein during any license year, desires to enter the State and to do business therein *during the succeeding license year*, it is required, on or before the last day of February of the then current license year:

- (a) to file an application for a license to do business in the State from the following March 1st to and including the next succeeding last day of February (see form of "Agreement and Application for License" on page 22 of the record).
- (b) to file the date required by Section 10474, O. S. 1931 (36 O. S. 1941 § 101), the report required by Section 10474, *supra*, as amended (36 O. S. 1941 § 104), and the statement required by said Section 10477 (36 O. S. 1941 § 56).
- (c) to deposit the collateral required by law.
- (d) to pay an "entrance fee" of from \$25.00 to \$200.00.
- (e) to show payment of a tax of two per cent (now four per cent) on all premiums, less proper deductions, which it received in the State during the preceding calendar year, *which payment was made for the privilege of having been permitted to enter Okla-*

homa and to do business therein during the then current license year. Said company is also required to pay, on or before the last day of February of said succeeding license year, a similar tax on all premiums, less proper deductions, which it receives in the State during the preceding calendar year, for the privilege of having been permitted to enter Oklahoma and to do business therein during said succeeding license year, and

- (f) to agree to pay "all such [valid] taxes and fees as may at any time be imposed by law or act of the Legislature.

When the requirements set forth in paragraph (a), (b), (c), (d), (e), and (f), *supra*, have been met, the company is issued a license (see form of License on page 23 of record) entitling it to enter Oklahoma and do business therein from March 1st of the then current year, to and including the next succeeding last day of February of the ensuing year. Said license remains in effect until said date, that is, unless a refusal by said company to pay valid taxes or fees imposed upon it "by law or act of the Legislature," such as a refusal to pay valid advalorem taxes on its real or personal property, "shall work a forfeiture on such license" as provided in Section 1, Article 19, *supra*.

In connection with the issuance of both said original and succeeding licenses to a foreign insurance company it will be noted that under the provisions of Section 10478, *supra*, and of said section as amended (36.O.S. 1941 § 104), if the company fails to pay its annual premium taxes on or before the next succeeding last day of February, it

"shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars (\$500.00),"

and if said failure continues for as much as sixty days after said date, it

"shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this state."

The provision last above quoted inferentially permits a delinquent company, such as is mentioned therein, to do business in Oklahoma for sixty days after said last day of February, *even though its license expired as provided in the last portion of said Section 10477 (36 O.S. 1941 § 56)* on said date, and inferentially authorize the Insurance Commissioner, if and when said company is so debarred, to revoke the license or certificate of authority of each of its agents in this State.

**Annual Privilege Taxes May Be Paid
Either Before or After Exercise of
Privilege**

The fact that annual privilege taxes, such as are involved here, are paid after rather than before the exercise by a foreign insurance company of the privilege of entering a State and doing business therein during any license year, is immaterial. This is especially true in Oklahoma since proof of the payment of said privilege taxes by a foreign insurance company is a condition

precedent to the issuance of a license thereto for the ensuing license year.

In this connection, attention is called to the case of *Carpenter, Insurance Commissioner v. Peoples Mutual Insurance Co.* (Cal., 1937), 74 Pac. (2d) 508 (cited on page 48 of petitioner's brief), wherein the second paragraph of the syllabus is as follows:

"The payment of a privilege tax may precede exercise of privilege or follow it, the choice of method being within legislative discretion, and where tax is proportionate to amount of business alone, it is equitable that it be paid after conclusion of year in which privilege is exercised."

In the case of *Sovereign Camp, W. O. W. v. Casados, et al.*, 21 Fed. Supp. 989 (D.C.-N.M. 1938), a three judge Federal District Court held in relation to a 1937 act of the State of New Mexico imposing an annual gross premium tax on certain foreign insurance companies of that State, as follows:

*"Clearly this is a tax imposed for the privilege of doing business within the State of New Mexico. Payment of the tax is a condition precedent to the issuance of a license by the proper authorities upon compliance with the laws of the state * * **

" * * We, therefore, conclude that the tax paying date is immaterial. The date on which the license is renewed or granted is controlling, which is April 1, 1937."*

Attention is also called to the recent case of *Pacific Mutual Life Insurance Company v. Hobbs, Commissioner of Insurance*, (Kan., 1940), 103 Pac. (2d) 854

(35).

(cited on page 48 of petitioner's brief), wherein the syllabus is as follows:

"1. Our statute G. S. 1935, 40-252, requiring foreign insurance companies at the time of making annual statements required by law, to pay taxes on the gross amount of premiums received by them for business done in the state during the preceding year, *imposes such taxes, payable at the end of the year, for the privilege of doing business in the state.*

"2. The tax on gross premiums received by foreign insurance companies for business done in the state is an excise tax in the nature of a franchise or privilege tax on the privilege of doing business, *and partakes of a license tax in the sense that payment thereof is required as a condition precedent to the renewal of such companies' certificates of authority.*"

In the body of the opinion of said case it is stated:

"The tax is on the privilege of doing business in the state, — the tax is fixed at a percentage of premiums received during the preceding year. *The payment of the tax follows the exercise of the privilege. The method selected appears to be both equitable and convenient.*"

The fact that petitioner first entered Oklahoma after the annual two per cent premium tax law was enacted but before the 1941 annual four per cent premium tax law went into effect, is immaterial.

The fact that said annual privilege tax was raised from two to four percent after the petitioner insurance company was first licensed or permitted to do business in

Oklahoma in 1922 for the license year ending February 28, 1923, is immaterial. In this connection attention is called to the case of *Northwestern National Insurance Company of Milwaukee v. Lee* (D. C. Or.-1931), 49 Fed. (2d) 274, wherein the third paragraph of the syllabus is as follows:

"Foreign corporation, permitted to enter state and engage in business, has right to invoke equal protection clause, whether unjust discrimination arise under prior or subsequent legislation."

The Oregon law involved in said case required foreign fire insurance companies who were licensed to transact business in the State of Oregon to pay a \$500.00 annual license fee for each agent it appointed in excess of one agent in cities of that state having a population in excess of 50,000 inhabitants. Said law was in effect at the time said insurance company was first licensed to do business in the State of Oregon but said fees were not paid to procure said company the right or privilege of doing insurance business in that state. In holding said law unconstitutional, the court held:

" * * * unless the \$500.00 license fee imposed as a condition precedent to the employment of additional agents for the foreign insurance company is a condition precedent of a permit to the insurance company to do business in the state, it is an unjust discrimination violative of the Fourteenth Amendment to the Federal Constitution. It is assumed * * * by the defendant herein in its brief, that it is such a condition precedent, and therefore justified. No reason is advanced in support of this assumption, and the only basis for such an assumption which occurs to us is that

the insurance company making application for license to transact insurance business in the state knows when it makes such application that the law under which the application is made does in fact provide that if it desires to appoint more than one agent in each city, or two in Portland, it must pay the additional license fee. But this is not sufficient to justify the discrimination against it and no case has been cited which goes to that extent. On the contrary, the courts with practical unanimity, hold that a foreign corporation, once having been permitted to enter into a state and engage in business, has a right to invoke the Fourteenth Amendment against unjust discriminations whether they arise under legislation passed after its permit or before. We think this is settled by the decision in *Liggett v. Baldridge*, 278 U. S. 105, 110, 49 S. Ct. 57, 58, 73 L. ed. 204, as applied to legislation enacted subsequent to the admission of the foreign corporation to do business, and in the case of *Quaker City Cab Co. v. Commonwealth*, 277 U. S. 389, 48 S. Ct. 553, 554, 72 L. ed. 927, as to legislation enacted before the foreign corporation was permitted to do business in this state."

This decision, which was cited with approval in *Springfield Fire and Marine Ins. Co. v. Holmes* (D. C. Mont., 1940), 32 Fed. Supp. 964-86, clearly holds that for a discriminatory tax levied by a state against a foreign corporation to be valid it must be levied for the right or privilege of entering and doing business in the State and not for the right or privilege of thereafter performing some desired act therein, and that this is true whether or not the law levying the tax was enacted before or after the corporation entered the State and ac-

quired the right or privilege of doing business therein. Therefore, if the annual privilege tax involved here is not levied for the right or privilege of entering and doing business in Oklahoma, it was invalid as to the petitioner, insurance company, even before it was increased from two to four per cent in 1941.

Gross Premium Tax Laws of Other States

As will hereinafter be shown the laws of at least 29 of the 48 states require the payment of *designated percentage taxes on premiums collected therein by foreign insurance companies* although no like or equalizing tax is required to be paid by competing domestic insurance companies. *However respondent has been unable to find a single case holding any of said laws invalid under either the 14th Amendment or any other constitutional provision, and petitioner has cited none.* Said laws have been in force, in many instances, far longer than the Oklahoma law involved here and apparently have been considered constitutional and valid by all foreign insurance companies adversely affected thereby.

In practically all of such statutes other annual fees, similar to the annual "entrance fee" referred to in the second paragraph of Section 2, Article 19, *supra*, of the Oklahoma Constitution, are collected from foreign insurance companies, but such collections have apparently not been treated by the courts or by the insurance companies as preventing said designated percentage taxes on premiums, although discriminatory, from also being collected.

Moreover; if the annual "entrance fee" mentioned in

said second paragraph are the sole fees or taxes paid by foreign insurance companies for the right or privilege of entering Oklahoma and doing business therein, as contended by petitioner, it is clear, inasmuch as said fees are required to be paid at the beginning of each license year, that when such a company first (or subsequently) enters Oklahoma to do business therein, it does so for only one license year, and not, as also contended by petitioner, indefinitely.

In support of the statements above set forth as to discriminatory premium tax laws of other states, respondent respectfully calls attention to the booklet "Taxation Manual (1942-1943)," published by "The National Board of Underwriters" (a copy of which will be furnished the court upon request), which shows that in at least 29 of the 48 States foreign insurance companies are required to pay annual percentage taxes on premiums collected therein (as well as other annual fixed fees), although like or equalizing taxes are not collected from competing domestic insurance companies.

In this connection said booklet reveals that in the States listed below (the booklet is not clear as to certain States, hence same are not listed here), discriminatory percentage taxes on premiums are collected, as follows:

State	Percentage tax on premiums of foreign insurance companies.	Percentage tax on premiums of domestic insurance companies.
Ala.	2 $\frac{1}{2}$ % Life; 1 $\frac{1}{2}$ % Fire	1 %; less tax reduc. inv.
Ariz.	2 %	0
	2 $\frac{1}{2}$ % Life, A & H.;	
	2 % Surety and Bond	
Colo.	2 %. No tax if over 50 % of assets inv. in Colo. Bonds, etc.	0
Conn.	Reciprocal, except Co's of other Co's pay 2 %.	Money on deposit, etc., reduce tax to 0 %.
Fla.	3 % on W .C.; 2 % on other ins.	0
Ill.	2 %	0
Ind.	3 %, less losses.	0
Iowa	2 $\frac{1}{2}$ %	0
Kan.	2 %	0
Ky.	2 %	2 % on W. C., only
Me.	2 %	0
Mass.	2 %, except $\frac{1}{4}$ of 1 % on net value of Life Ins.	$\frac{1}{4}$ of 1 % on net value of Life Insurance.
Mich.	3 % on Fire, Marine and Auto; 2 % Cas. and Life	0
Miss.	3 %, except 2 $\frac{1}{4}$ % on Life, H. & A. (Less tax inv.)	Diff. between ad val. tax and 50% foreign Co. tax
Neb.	2 %	0
N. H.	2 %	0
N. J.	2 %	0
N. M.	2 %	0
N. Dak.	2 $\frac{1}{2}$ %	0
Ohio	2 $\frac{1}{2}$ %	.002 % on Cap. & Sur. Opt. 8 $\frac{1}{3}$ times Ohio prem.
Okl.	4 %, except on fraternals	0
Ore.	2 $\frac{1}{4}$ %	0
Pa.	2 %	0
S. C.	5 $\frac{1}{2}$ % on W. C.: 1 % on other insurance.	.008 %
S. Dak.	2 $\frac{1}{2}$ %	1 %
Tenn.	2 $\frac{1}{2}$ %	0
Wash.	2 $\frac{1}{4}$ %	1 %
W. Va.	2 %	0

The Philadelphia Fire Association Case

In determining the meaning and validity of the constitutional and staufory provisions of Oklahoma, heretofore quoted, especially those that impose an annual two per cent tax on the Oklahoma premiums of foreign insurance companies but not on the like premiums of competing domestic insurance companies, the intention of the Constitutional Convention and Legislature of Oklahoma in respectively adopting and enacting the same should be ascertained.

In this connection it must be presumed that said Convention and Legislature in adopting and enacting said provisions in 1907 and 1909 respectively, were cognizant of the fact that the Supreme Court of the United States had theretofore held in the case of *Philadelphia Fire Association v. New York* (1886), 119 U. S. 110, 30 L. ed. 342. (stressed by respondent in the trial and circuit courts but not referred to in petitioner's brief), that a State law imposing an annual tax on the premiums collected in said State of a foreign insurance company but not on the like premiums of a competing domestic insurance company, did not violate the 14th Amendment of the Constitution of the United States if the tax was imposed for the right or privilege of entering the State and doing business therein during the succeeding license year.

Inasmuch as said case was (and still is) the only decision of the Supreme Court of the United States on said question, it must be presumed that the principles of law announced therein were followed in the adoption and enactment of the constitutional and statutory provisions involved here. In fact, it is inconceivable that the Okla-

homa Constitutional Convention and 1909 Legislature intended to impose said annual two per cent premium tax in such a way as to make same unconstitutional, when a way had been pointed out in said decision to make said tax constitutional.

In this connection respondent quotes from the Philadelphia Fire Association case, as follows:

"As early as 1853, the State of New York, by a statute, c. 466, required of every fire insurance company incorporated by any other state or any foreign government, as a prerequisite to doing business in the state, that it should file an appointment of an attorney on whom process was to be served, and a statement of its pecuniary condition, and procure from a *designated public officer* a certificate of authority stating that the company had complied with all the requisitions of the statute; and also required the renewal from year to year of the statement and evidence of investments; and provided that such public officer, on being satisfied that the capital of the company and its securities and investments remained secure, should furnish a renewal of the certificate of authority. A violation of the provisions was made a penal offense. This act, with immaterial amendments, is still in force.

"This Pennsylvania corporation came into the State of New York [in 1872] to do business by the consent of the state, under this Act of 1853, with a license granted for a year and has received such license annually, to run for a year. It is within the state for any given year under such license, and subject to the conditions prescribed by statute. The state, having the power to exclude entirely, has the power to change the con-

ditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given.

"The Act of 1865 [the New York retaliatory law] had been passed when the corporation first established an agency in the state. The amendment of 1875 changed the Act of 1865 only by giving to the superintendent the power of remitting the fees and charges required to be collected by then existing laws. Therefore, the corporation was at all times, after 1872, subject, as a prerequisite to its power to do business in New York, to the same license fee its own state might thereafter impose on New York companies doing business in Pennsylvania [the Pennsylvania three per cent premium tax law was passed in 1873]. By going into the State of New York in 1872, it assented to such prerequisite as a condition of its admission within the jurisdiction of New York. It could not be of right within such jurisdiction, until it should receive the consent of the state to its entrance therein under the new provisions, and such consent could not be given until the tax, as a license fee for the future, should be paid."

(Brackets supplied by respondent).

The above case was cited with approval in the case of *Home Indemnity Company of New York v. O'Brien* (C. C. A. Mich., 1939) 104 Fed. (2d) 413, apparently as authority for the proposition that a state has the power, by the passage of retaliatory legislation,

"to protect its own domestic insurance companies doing business in other states from burdens, prohibitions and limitations placed upon them by taxes, license fees, deposits and similar measures."

In this connection it will be noted that if State laws providing for the payment by foreign insurance companies of annual discriminatory privilege taxes are illegal, as contended by petitioner, it would be wholly unnecessary for other States to enact retaliatory legislation in effect providing that insurance companies domiciled in States having such discriminatory laws and desiring to do business in said "other states" must, in order to do business therein, pay similar privilege taxes in said "other states."

Oklahoma (36 O. S. 1941 § 106) has a retaliatory law containing, among others, such taxation retaliatory provisions, said law being treated as valid in the case of *Read v. National Equity Life Insurance Co.*, 114 Fed. (2d) 977, in respect to its retaliatory policy writing provisions. Moreover, 40 of the 48 States have similar retaliatory laws. This is shown by the booklet "Taxation Manual (1942-1943)", heretofore mentioned.

Therefore, while Oklahoma insurance companies are favored in Oklahoma by reason of the fact that they are not required to pay said four per cent annual gross premium taxes on their Oklahoma premiums, they are required to pay similar taxes on any premiums they may collect in 40 of the other 47 States.

The New York Life Insurance Company Case

The above constitutional provisions, as well as Section 10478, O. S. 1931 (Section 6687, C. O. S. 1921),

supra, were construed in the case of *New York Life Insurance Company v. Board of Commissioners of Oklahoma County* (Okla. 1932), 155 Okla. 247, 9 Pac. (2d) 936. In said case, which is referred to briefly on page 41 of petitioner's brief, the Oklahoma Supreme Court held that the two per cent tax on the Oklahoma premiums of the New York Life Insurance Company was a proper "license fee, or privilege tax" charged said company "for the right or privilege to do business" in Oklahoma.

In this connection respondent, for the information of the court, quotes certain pertinent parts of said decision as follows:

"Percentage on the income or receipts, by agents of foreign insurance companies, imposed for the privilege of carrying on their business, is not a tax within a constitutional sense. Desty, American Law Taxation, p. 229 * * *

"The state reserves the right to prohibit foreign insurance companies from doing business within the state, and it may regulate, prescribe, and impose any burdens, terms, or conditions it chooses, reasonable or unreasonable, in giving its assent to such corporation to engage in business within the state.

"In the case at bar no lump sum is designated as a license fee or privilege tax for the purpose of transacting business within the state. It seems manifest that a certain percent of the premiums collected by a foreign insurance company is an equitable mode of determining what burdens, license fee, or privilege tax should be charged to said corporation for the right or privilege to do business within the state."

It will be noted from the last paragraph above quoted that the Oklahoma Supreme Court expressly held that "no lump sum" is designated by the constitution and laws of Oklahoma "as a license fee or privilege tax for the purpose of transacting business out of the State". Said paragraph clearly shows that said Court considered the annual two per cent premium tax set forth in the third paragraph of Section 2 of Article 19 of the Oklahoma Constitution, and not the definitely fixed schedule of fees set forth in the second paragraph of said section, as being charged for the right or privilege of entering Oklahoma and doing business therein.

Moreover, when said court held in the above case that the payment by a foreign insurance company of *said annual two per cent premium tax* was not in lieu of ad valorem taxes on its personal property, and that such a company (like a competing domestic company) must pay ad valorem taxes on its personal property in this State, it was undoubtedly aware that said premium tax (there being no like or equalizing tax paid by competing domestic insurance companies), discriminated heavily against foreign insurance companies. Therefore, unless said court was of the opinion that said annual two per cent premium tax was a tax or fee for the right or privilege of entering Oklahoma and doing business therein during the year for which same was paid, it would not have considered or treated said tax as constitutional and valid. It was, therefore, necessary, and not merely *dicta*, for the court to hold that said annual two per cent premium tax was charged:

"for the right or privilege to do business within the state."

**The Lincoln National Life Insurance
Company Case**

Inasmuch as the Honorable Lucius Babcock, Judge of the District Court of Oklahoma County, Oklahoma, on September 8, 1942 handed down his written decision (R. 35-38) in the case of *Lincoln National Life Insurance Company v. Jess G. Read, Insurance Commissioner of Oklahoma, et al.*, No. 105488, District Court of Oklahoma County (the first cause of action of said case being essentially identical to the cause of action set forth in petitioner's original complaint), in which decision he construed the meaning of the constitutional and statutory provisions of Oklahoma involved in this case in relation to issues identical to those involved in the instant proposition, and since neither of the appellate courts of Oklahoma have construed said provisions in relation to such issues (although the New York Life Insurance Company case, *supra*, referred to in said decision, is in harmony therewith), Judge Babcock's said decision (which was on March 8, 1943 appealed to the Oklahoma Supreme Court where it has been briefed and submitted), in so far as the meaning of said constitutional and statutory provisions are concerned, should be considered, as will hereinafter be shown, as binding on (or at least highly persuasive by) this Court, although it is otherwise as to that part of said decision which holds that said provisions, as so construed, do not violate the 14th Amendment of the Constitution of the United States.

Respondent, therefore, respectfully asks the Court to carefully examine and consider Judge Babcock's said decision, especially paragraphs (a) and (b) thereof.

(R. 36-37) which specifically relate to said first cause of action.

While it is true that the above decision (same being the only applicable Oklahoma District Court decision) is not that of an appellate court of this State (although such district courts exercise certain final as well as intermediate appellate powers), it is a decision of a constitutional trial court having "general jurisdiction" in the State of Oklahoma, (*Samuels v. Granite Savings Bank & Trust Company*, 150 Okla. 174, 1 Pac. (2d) 145) and which is "endowed with the dual power of a court of equity and a court of law" (*Wentz v. Thomas*, 159 Okla. 124, 15 Pac. (2d) 65), and hence has judicial powers essentially the same as those exercised by the Court of Chancery of the State of New Jersey.

In this connection it will be noted by an examination of Article 6 of the Amended Constitution of New Jersey and Title 2, Sub-title 1, Chapter 2 of the 1937 Revised Statutes thereof, that the Court of Chancery of said state does not exercise appellate or intermediate appellate jurisdiction, but that said court, acting through Vice-Chancellors sitting in prescribed districts of the state, acts as a trial court in chancery or equity cases, and that it is expressly provided in said chapter that when any:

"cause or matter is referred to a Vice-Chancellor, he may take and hear the evidence of witnesses therein orally, in the same manner as evidence is taken and heard in the several courts of law in this state on trials by jury."

It is, therefore, important to note that in the recent case of *Fidelity Union Trust Company, et al., v. Field*,

311 U. S. 169, 85 L. ed. 109, it was held that a decision of a Vice-Chancellor of the Court of Chancery of the State of New Jersey construing a statute of that state was binding not only on a United States District Court sitting in said state as to the meaning of said statute but upon the United States Circuit Court of Appeals. In this connection we quote the syllabus of said case, as follows:

"Decisions of the Chancery Court of New Jersey, in two cases decided independently, in which the Vice-Chancellors reach the same conclusion with respect to the proper construction to be given a state statute, relating to trust deposits in banks, are binding on Federal courts in cases involving the efficacy of declarations of trust and gifts of bank deposits, where such decisions have not been reviewed by the Court of Errors and Appeals of New Jersey, although decisions of the Chancery Court are not always followed by the Supreme Court of New Jersey or even by the Chancery Court itself, and may, of course, be disapproved at any time by the Court of Errors and Appeals.

"It is the duty of a Federal court, when bound by state law, to ascertain and apply that law even though it has not as yet been expounded by the highest court of the state."

By an examination of the two decisions of the Court of Chancery of New Jersey, above referred to, same being *Thatcher v. Trenton Trust Company*, 119 N. J. Eq. 408, 182 Atl. 912, and *Travers v. Reid*, 119 N. J. Eq. 416, 182 Atl. 908, it will be found that the decisions of the Vice-Chancellors therein were written, as the decision of Judge Babcock in this case was written, in relation to original trials of the actions involved therein. Said

decisions were followed by the United States District Court which tried the Fidelity Union Trust Company case but were not followed by the United States Circuit Court of Appeals, said latter court accordingly reversing the judgment of the United States District Court which followed said decisions. *In this connection this court held:*

"We think that this ruling was erroneous."

The Great Northern Life Insurance Company Case

The case of *Great Northern Life Insurance Company v. Read, Insurance Commissioner of the State of Oklahoma*, 136 Fed. (2d) 44, fully supports the instant proposition. It is from said decision that this appeal is taken. However, as said decision is quoted in full on pages 39 to 46 of the record herein, respondent deems it unnecessary to further discuss said decision here.

The Hanover Fire Insurance Company Case

In the case of *Hanover Fire Insurance Company v. Carr, Treasurer* (formerly Harding, Treasurer), 272 U. S. 494, 71 L. ed. 372 (referred to on pages 41, 42, 44, 45, 47 and 56 of petitioner's brief), the first and third paragraphs of the syllabus are as follows:

"1. A state may not exact as a condition of a corporation doing business within its limits that its rights secured by the Constitution of the United States may be infringed.

"3. An inequality between a domestic corporation and a foreign corporation with respect to the securing by it of the right to do business within the state does not come within the inhibition of

the Federal Constitution against deprivation of the equal protection of the laws."

Inasmuch as the Hanover case, is the decision upon which petitioner places its chief reliance here, same will be fully discussed by respondent. However, before doing so we desire to call attention to the salient fact, as will hereinafter be shown, that while said case held that the *net receipts tax of Illinois*, as construed by the Illinois Supreme Court in 1923, was discriminatory and invalid, it in effect held that the 1919 two per cent annual gross premium tax of Illinois (same being essentially the same as the tax involved here) was a tax paid for the right or privilege of doing business in said state for the ensuing year and was hence valid even though discriminatory.

Moreover, petitioner wholly fails to consider in its brief the pertinent fact that while the 1919 act was passed long after the Hanover Fire Insurance Company first entered the State of Illinois, the annual two per cent premium tax levied thereby, even though discriminatory, was held valid as to said company under the theory that same was a tax for the right or privilege of annually entering said state and doing business therein during the succeeding license year.

In this connection the Hanover case reveals that in 1869 the State of Illinois passed a law relating to the domestication of foreign insurance companies in Illinois. Section 30 of said Act, which was immaterially amended in 1879, operated to annually levy the regular ad valorem tax on the *net receipts* of such companies during the prior year. Section 22 of said 1869 law provided for the admission and regulation of such a company, required

local agents thereof to secure annual certificates of authority from the Director of Trade of said state showing that the company had complied with the law "which applied to it," and also required the company to pay \$30.00 for its charter, \$10.00 with its annual statement and \$2.00 for each agent's certificate of authority. The payment of the *net receipts tax* provided for in Section 30 was in no way a condition precedent for said company to enter the State of Illinois and to do business therein. No similar tax was required of domestic corporations, but both foreign and domestic corporations were required to pay the regular ad valorem tax upon their real and personal property.

The computation of the regular ad valorem tax in Illinois on personal property was in theory upon fifty per cent of the actual value thereof, but as a matter of practice said fifty per cent was debased to thirty per cent, hence personal property in Illinois was actually only taxed on thirty per cent of its actual value. Said *net receipts tax*, being considered a tax upon personal property, was debased to thirty per cent of said net receipts and said ad valorem tax computed thereon. This procedure was followed from 1869 to 1923, when the Supreme Court of Illinois held that said ad valorem tax should be levied upon the full amount, rather than upon this debased amount, of the *net receipts*, of a foreign insurance company.

Prior to said holding and in the year 1919, the Legislature of Illinois passed a law requiring foreign insurance companies to pay an annual state tax for the privilege of doing an insurance business in Illinois equal

to two per cent of the gross amount of the premiums received thereby during the preceding year, but said law did not repeal or supersede said prior net receipts tax law.

It is significant to note that this annual two per cent premium tax, which was levied for a purpose similar to that of the tax involved here, has never been protested by foreign insurance companies doing business in Illinois, and it is specifically stated in the Hanover case that the Hanover Fire Insurance Company had paid said tax.

It was also the contention of the Illinois court in its 1923 decision that while payment of said annual net receipts tax was not a condition precedent for said company to enter said state, that since its agents were required by Section 22 of the 1869 Act to procure annually from the insurance superintendent a certificate of authority stating that the company had "complied with all the requirements" of said Act, and since payment of said net receipts tax was a part of said requirements, said tax was levied as compensation for the privilege of continuing "to do business in said state" and was hence valid even though discriminatory.

The Hanover Company did not object to the payment of said *net receipts tax* until the Supreme Court of Illinois held in 1923, as aforesaid, that same should be computed upon the actual amount of net receipts and not upon the debased value thereof. After this decision said company refused to pay the full amount of said *net receipts tax* and filed action to enjoin the collection of a tax warrant therefor.

This court held that said tax, as so computed, was discriminatory and invalid. In so holding the court, after citing cases to the effect that a State cannot as a condition precedent to the admission of a foreign corporation to do business therein validly require the corporation to surrender rights guaranteed to it by the Federal Constitution, such as a right derived under the Commerce Clause or the right to remove an action brought against it to a Federal Court, *had this to say in relation to the validity of State taxes under the 14th Amendment:*

*"In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind ***"*

"What, therefore, we have to decide here is whether the application of section 30 can be one of the

conditions upon which the insurance company is admitted to do business in Illinois, or whether under the law of 1919 the authority granted by the department of trade and commerce for which the company paid two per cent of gross premiums received the previous year by it put it upon a level with domestic insurance companies doing business of the same character.

*"It is plain that compliance with section 30 is not a condition precedent to permission to do business in Illinois. The State Supreme Court concedes this, * * *."*

By the above language this court in effect held that while said *net receipts tax*, as construed by the Illinois court in 1923, was an "occupation tax" or a "privilege tax," same was not paid "for the license or privilege to do business in the state," and that the Illinois court conceded that compliance with said Section 30, to-wit: payment of said *net receipts tax*,

"is not a condition precedent to permission to do business in Illinois."

This court also in effect held that said 1919 two per cent annual gross premium tax, same being analogous to the tax involved here, was a tax for the right or privilege of doing business in Illinois for the ensuing year and hence valid. It will be here noted that the court held that while the license construed in the Greene case, hereinafter mentioned, "was indefinite", the license construed in the Hanover case "must be renewed from year to year." This is shown by the following excerpt from the Hanover case, to-wit:

"In the Greene case the license was indefinite. In this case it must be renewed from year to year, but

the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licenses unconstitutional burdens."

The above quoted language is in harmony with the holding of this court in *Philadelphia Fire Association v. New York, supra*, and reveals that the licensing provisions of law, such as the Illinois law construed in the Hanover case, only permit a foreign insurance company to do business in the licensing state for one year. It was probably for this reason that the 1919 two per cent annual gross premium tax law of Illinois, which, as stated in the Hanover case,

"* * * provided that each non-resident corporation licensed and admitted to do an insurance business in the state should pay an annual state tax for the privilege of so doing, equal to two per centum of the gross amount of premiums received during the preceding calendar year on contracts covering risks within the state after certain reductions;
* * *."

was treated as valid by this court, and said annual two per cent gross premium tax, both before and since said decision, been paid without question by foreign insurance companies doing business in Illinois.

In the Hanover case the court cited with approval the case of *Southern Railroad Company v. Greene*, 216 U. S. 400, 54 L. ed. 536 (referred to on pages 52 and 53 of petitioner's brief), as follows:

"* * * a railway corporation of another state had come into Alabama and secured a license to do business therein as an intrastate railway and in course of that business had acquired in the state

property of a fixed and permanent nature upon which it had paid all the taxes levied by the state. It was held that a *new and additional franchise tax* for the privilege of doing business within the state, not imposed upon domestic corporations doing business in the state of the same character, violated the equal protection clause."

It will be here noted that the two per cent (now four per cent) gross premium tax involved in this case is not a "new and additional franchise tax," but that same is an *annual privilege tax* which every foreign insurance company must pay which desires to do business in Oklahoma during the succeeding license year. The mere fact that said tax was fixed at two per cent by Section 2, Article 19, *supra*, "until otherwise provided by law," and has in 1941 raised by law to four percent, does not mean that said tax is not, as stated in the New York Life Insurance Company case, *supra*,

"a privilege tax for the purpose of transacting business within the state."

The Hanover case was followed in the case of *Sneed, Treasurer v. Shaffer Oil and Refining Company, et al.*, (C. C. A. 8th Cir., 1929), 35 Fed. (2d) 21 (referred to on page 52 of petitioner's brief), wherein it is held that an Oklahoma law then enforced by the Oklahoma Corporation Commission, levying an annual discriminatory corporation license tax upon foreign corporations which had theretofore received (like the railway company in the Greene case, *supra*), an "indefinite license" to do business in Oklahoma from the Oklahoma Secretary of State, was invalid under the 14th Amendment of the Constitution of the United States. Said case is not in

point here since a foreign insurance company receives no license whatsoever from the Oklahoma Secretary of State (*see State v. Prudential Ins. Co., et al.*, 180 Okla. 191, 68, Pac. (2d) 852), and the only license or permit it receives is a license from the Oklahoma Insurance Commissioner to do business in Oklahoma for one license year.

FIFTH PROPOSITION

THE OKLAHOMA INSURANCE COMMISSIONER DID NOT MAKE AN UNCONSTITUTIONAL OR IMPROPER APPLICATION OF THE 1941 ACT BY REASON OF THE FACT THAT HE REQUIRED FOREIGN INSURANCE COMPANIES SEEKING TO OBTAIN A LICENSE TO DO BUSINESS IN OKLAHOMA FOR THE YEAR 1942, TO PAY A FOUR PER CENT TAX ON ALL PREMIUMS, LESS PROPER DEDUCTIONS, COLLECTED BY SAID COMPANIES IN OKLAHOMA DURING THE YEAR, 1941.

On pages 53 to 57 of petitioner's brief the converse of the above proposition is presented. However, in connection therewith attention is called to Section 10478, O. S. 1931 (enacted in 1909), as amended by Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941 (36 O.S. 1941 § 104), the material part of which is as follows:

"Every foreign insurance company * * * doing business in the State * * * shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner,

the total amount of gross premiums received in this State within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of four per cent on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted * * *."

The only effect of said amendment, which went into effect on April 25, 1941, was to increase said annual premium tax from two to four percent. It, therefore, appears that a foreign insurance company doing business in Oklahoma for the license year ending February 28, 1942, is required to pay a four cent tax on all premiums, less proper deductions, which it collected in Oklahoma during the year 1941, and that this is true even though the 1941 Act did not go into effect until April 25, 1941. In support of this conclusion attention is called to the case of *Du Laney, Insurance Com'r. v. Continental Life Ins. Co.* (Ark., 1932), 47. S. W. (2d) 1082, wherein the fourth paragraph of the syllabus is as follows:

"Statutory amendment increasing tax on gross premium receipts of certain insurance companies held to disclose legislative intent that statute should apply to gross premiums receipts for entire year 1931, although practically one-half of fiscal year of 1931 had expired before act became effective."

In the case of *Sovereign Camp W. O. W. v. Casados, et al.*, 21 Fed. Supp. 989, heretofore referred to, the seventh paragraph of the syllabus is as follows:

"An amendment to statute under which benefit societies were licensed to do business in New Mexico imposing privilege tax on basis of gross premiums collected during preceding year *as a condition precedent to issuance of license on April 1, 1937*, when societies' licenses expired was not invalid as operating retrospectively, since societies had no greater right to do business in state than that granted by statute as amended."

In the body of the opinion appears the following language:

"Clearly this is a tax imposed for the privilege of doing business within the state of New Mexico. *Payment of the tax is a condition precedent to the issuance of a license by the proper authorities upon compliance with the laws of the state.*

"* * * it was the intent of the Legislature that the act should be effective and the tax computed on the basis of the gross premiums collected by the respective companies during the preceding year, to-wit 1936, *as a condition precedent to the issuance of license on April 1, 1937*, to do business during the ensuing year. The act became a law on March 6, 1937. The tax is provided to be paid on March 1, 1937. Complainants had no license to do business in the state of New Mexico after April 1, 1937.

"* * * We, therefore, conclude that the tax paying date is immaterial. *The date on which the license is renewed or granted is controlling*, which is April 1, 1937. Chapter 69, supra, was the law of the state of New Mexico *at that time* and the complainants are required to comply with the provisions of chapter 105, Session Laws of New Mexico 1931, as amended by chapter 69 of the Session

Laws of New Mexico 1937, as a condition precedent to the renewal or the granting of license, which expires on April 1, 1937."

Before concluding this portion of our brief respondent desires to again call attention to the case of *Pacific Mutual Life Ins. Co. v. Hobbs, Com'r. of Insurance* (Kan., 1940), 103 Pac. (2d) 854. The syllabus of said case is as follows:

"1. Our statute G. S. 1935, 40-252, requiring foreign insurance companies, at the time of making annual statements required by law, to pay taxes on the gross amount of premiums received by them for business done in the state during the preceding year, imposes such taxes, payable at the end of the year, for the privilege of doing business in the state.

"2. The tax on gross premiums received by foreign insurance companies for business done in the state is an excise tax in the nature of a franchise or privilege tax on the privilege of doing business, and partakes of a license tax in the sense that payment thereof is required as a condition precedent to the renewal of such companies' certificates of authority."

The principles of law above announced, while in harmony with those set forth in the third proposition of this brief, are not controlling as to the issue involved in the instant proposition. However, in the body of the opinion of the above case certain statements are made that do support the same. In this connection it will be noted that the plaintiff company in said case unsuccessfully asked for a writ of Mandamus requiring the Insurance Commissioner of Kansas to refund certain premium.

taxes paid by it under protest in January, 1937 under the theory:

- (a) that the laws of said State required such taxes, although computed on premiums collected during the preceding year, to be paid for the privilege of doing business in Kansas during the ensuing year, and
- (b) that since the company whose business it had taken over under an assumption agreement in July, 1936, had paid in January of said year a tax for the privilege of doing business in Kansas during the year 1936, the plaintiff company could not be required to pay a tax on premiums collected by said company prior to July, 1936.

In refuting said theory the Kansas court held:

"The tax is on the privilege of doing business in state, — the tax is fixed at a percentage of premiums received during the preceding year. The payment of the tax follows the exercise of the privilege. The method selected appears to be both equitable and convenient.

"Upon the theory advanced by the plaintiff a foreign company coming into the state would be exempt from taxation upon the business done in the first year, if it withdrew at the end of the first year. It is not to be presumed the legislature intended to exempt a foreign insurance company from taxation upon its first year's business.

"In support of the suggestion that the tax is prospective privilege tax, counsel rely on *McNall v. Insurance Co., supra*. That case arose shortly after the original premium-tax statute was enacted. The insurance company had been doing business in the state before the law was passed. The vital

question before the court was formulated in the first paragraph of the opinion which reads (65 Kan. 694, 70 Pac. 605): 'It is insisted by counsel for defendant in error that the law set forth in the statement was given retroactive effect by the collection, under its authority, of taxes from the insurance company for the year 1899, based on business done in 1898, and that in fact the tax was on insurance written before the law was passed. *With this contention we do not agree.*'"

It will thus be noted that the Kansas court, while holding *in the case there under consideration* that the premium tax of that state was collected at the end of the license year for the privilege of doing business in Kansas during said year, also held *in said cited case* that since said tax was required to be paid as a condition precedent to securing a license to do business in Kansas during the ensuing license year, a company seeking a license shortly after said law went into effect had to pay said tax on all of the premiums it had collected during the prior year, even though part thereof were collected before said law went into effect.

C O N C L U S I O N

In consideration of the five propositions, above presented, respondent respectfully asks the Court to affirm the decisions of the District and Circuit Courts herein, and to render judgment in favor of respondent and against petitioner.

Respectfully submitted,

RANDELL S. COBB,
Attorney General of Oklahoma;

FRED HANSEN,
First Assistant Attorney General
of Oklahoma;

ANDY CROSBY, Jr.,

Attorneys for Respondent.

January, 1944

EXCEPTION

If a foreign insurance company enters Oklahoma after the first day of January of a given year, for example, after January 1, 1942, and before the last day of February of said year (February 28, 1942), ~~to-wit:~~ enters Oklahoma on January 10, 1942, inasmuch as no premiums would be collected by said company in this State prior to January 1, 1942, *supra*, said company could not pay a premium tax on February 28, 1942. Moreover, said company is not required by the Insurance Commissioner to pay taxes on premiums collected by it after January 10, 1942 and before February 28, 1942, or during the calendar year, until the last day of February, 1943, at which time he will require said company to pay taxes on all premiums collected thereby after it entered Oklahoma on January 10, 1942, and before January 1, 1943.

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CLERK

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

GREAT NORTHERN LIFE INSURANCE COMPANY,

Petitioner,

VS.

**JESS G. READ, Insurance Commissioner,
for the State of Oklahoma,**

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE TENTH CIRCUIT**

Answer To Brief Amici Curiae

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FRED HANSEN,
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of Oklahoma;

ANDY CROSBY, JR.,
Attorneys for Respondent.

February, 1944.

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Answer To Brief Amici Curiae

STATEMENT OF THE CASE

The statement of the case which appears on pages 3 to 8 of the brief of Amici Curiae is substantially correct, it being specifically admitted by respondent:

(a) That the issues in the case of *Lincoln National Life Insurance Company v. Jess G. Read*, the Insurance Commissioner of the State of Oklahoma, et al, referred to in said brief (which case was appealed to and is now pending for decision in the Supreme Court of Oklahoma), relating to the meaning and validity of constitutional and statutory provisions of Oklahoma requiring foreign insurance companies to pay annual gross premium taxes on the premiums collected thereby in Oklahoma, "are identical", as stated by Amici Curiae, to the issues involved in this case, and

(b) That the judgment of the District Court of Oklahoma County, Oklahoma, in the Lincoln National Life Insurance Company case, from which said appeal to the Supreme Court of Oklahoma was taken, was, as stated by Amici Curiae,

"introduced in the record of this cause by the respondent herein and constitutes a part of the record herein."

By an examination of said judgment (R-35-38) it will be found that no reference is made to the cause of action involved therein being a suit against the State of Oklahoma to which consent was not given; this for the reason that said action was a suit against the State of Oklahoma properly brought under authority of Section 12665 O. S. 1931, as construed in *Antrim Lumber Co. v. Sneed, State Treasurer*, 175 Okla. 47, 52 Pac. (2d) 1040 (see excerpt therefrom on page 8 of respondent's original brief herein), which case expressly holds:

"* * * Now, therefore, that there may no longer exist any confusion in this respect, we repeat that said section 9971, C.O.S.

1921 (section 12665, O. S. 1931), provides the taxpayers of this state with an ample, complete, and speedy and adequate remedy at law for the recovery of *any illegal taxes* paid by them (where not otherwise limited or specifically excepted by law), whether such payment is made to a state or municipal officer."

That the instant case was brought in the United States District Court under the purported authority of Section 12665, *supra*, is shown by the first paragraph of the "Stipulation of Facts" (R-20) which states that the sum sued for by petitioner was held by respondent

"as provided in Section 12665 O. S. 1931".

and by the fact that petitioner expressly stated on page 29 of its original brief in the United States Circuit Court of Appeals (from whose decision the instant appeal was taken) that

"This action was brought under permissive state legislation: Sec. 12665, O. S. 1931."

In relation to the present force and effect of Section 12665, as construed in the Antrim Lumber Company case, attention is called to the following argument quoted from respondent's trial brief in the Lincoln National Life Insurance Case (said argument also being set forth verbatim in respondent's trial brief in the United States District Court herein), to-wit:

"It should be here noted that the above section [12665] was expressly repealed by Section 63, Chapter 1a, Title 68, page 333, Oklahoma Session Laws 1941, and that while the provisions thereof were re-enacted, verbatim, as Section 50 of said

Act (page 327 of said laws), the scope of said latter section is limited by the title of said Act to cases involving the recovery of 'ad valorem' taxes (see syllabus 3 of *Excise Board, Washita County v. Lowden*, 189 Okla. 286, 116 Pac. (2d) 700). However, by the same token, since Section 63 of said 1941 Act, which section expressly repealed Section 12665, was contained in an Act whose scope was limited by its title to *ad valorem taxation*, as aforesaid, and since our Supreme Court in the case of *Antrim Lumber Company v. Sneed, State Treasurer*, 175 Okla. 47, 52 Pac. (2d) 1040, expressly held that said section authorized the recovery of special taxes, such as are involved here, as well as the recovery of *ad valorem taxes*; it is clear that Section 12665, *supra*, was only repealed in so far as it related to the recovery of *ad valorem taxes*, and is still in full force and effect in so far as it relates to the recovery of special taxes, such as are involved here. That this is true is conceded by both parties hereto."

Inasmuch as the reasoning above set forth was accepted by *Amici Curiae* and followed by the Court in the Lincoln National Life Insurance Company case, and since said action was admittedly properly brought in a state court pursuant to the permissive provisions of said section, it was unnecessary for the judgment in said case (R-35-38), referred to by *Amici Curiae*, to state that the cause of action involved therein was a suit against the State of Oklahoma to which consent had been given.

Whether or not this Court, if it finds that the United States District Court had jurisdiction of this action,

should hand down a decision on the merits of the case (which will necessarily require a determination of the meaning of the Oklahoma constitutional and statutory provisions quoted and discussed in the several briefs filed herein) while a determination of the meaning of said provisions is now pending and at issue in the Supreme Court of Oklahoma in the Lincoln National Life Insurance Company case, is a matter which respondent leaves, without argument, to the judgment of the Court (*Railroad Commission v. Pullman Co.*, 312 U. S. 496, 85 L. ed. 971, *City of Chicago, et al. v. Fieldcrest Dairies, Inc.*, 316 U. S. 168; 86 Fed. 1355, and *Meredith v. Winter Haven*, — U. S. — —, 88 L. ed. 1.) Respondent desires to state, however, that when a decision is handed down in said case by the Oklahoma Supreme Court (same being expected shortly) he will immediately send certified copies thereof to the Clerk of this Court.

In this connection it will be noted that in the event a decision adverse to the Lincoln National Life Insurance Company (whom Amici Curiae represent) is handed down in said case, the fact that same is, as contended by respondent, a suit against the State of Oklahoma to which the State has consented to be used in its own courts but not in the Federal courts, will not prevent said decision, if it denies said company any right, privilege or immunity secured by the Constitution or laws of the United States, from being reviewed by this Court. In support of the above conclusion attention is called to the case of *Smith v. Reeves*, 178 U. S. 436-45, 44 L. ed. 1140 (referred to on page 10 of respondent's original brief herein), wherein it is stated:

"In our judgment it was competent for the State to couple with its consent to be sued on account of taxes alleged to have been exacted under illegal assessments made by the state board, the condition that the suit be brought in one of its own courts. Such legislation ought to be deemed a part of the taxing system of the State, and cannot be regarded as hostile to the General Government, or as touching upon any right granted or secured by the Constitution of the United States. If the California statute be construed as referring only to suits brought in one of its own courts, it does not follow that injustice will be done to any taxpayer whose case presents a Federal question. For, if he be denied any right, privilege or immunity secured by the Constitution or laws of the United States and specially set up by him, the case can be brought here upon writ of error from the highest court of the State."

Said conclusion is also supported by the excerpt from the case of *Chandler v. Dix*, 194 U. S. 590, 48 L. ed. 1023, quoted on page 11 of respondent's original brief herein.

Argument and Authorities

FIRST PROPOSITION

THE ANNUAL TAX OF TWO PER CENT (SINCE APRIL 25, 1941, — FOUR PER CENT) COLLECTED ON THE OKLAHOMA PREMIUMS OF FOREIGN INSURANCE COMPANIES IS NOT AND NEVER HAS BEEN INVALID UNDER THE PROVISIONS OF THE 14th AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES BY REASON OF THE FACT THAT A LIKE TAX IS NOT COLLECTED ON THE OKLAHOMA PREMIUMS OF COMPETING DOMESTIC INSURANCE COMPANIES.

The above proposition is set forth as the "Fourth Proposition" of respondent's original brief herein, argument thereunder being set forth on pages 20 to 58 of said brief, same being incorporated herein by reference.

However, by an examination of the brief of Amici Curiae it will be noted that they, *in effect*, concede that a foreign insurance company is only licensed to do business in Oklahoma for one year at a time and that the fee or tax charged such a company for the right or privilege of entering Oklahoma and doing business therein for a license year may discriminate heavily against it in favor of a competing domestic insurance company, *but that they contend:*

- (a) That an admittedly discriminatory fee or tax, such as is involved here, must be paid as a "condition precedent" to the issuance by a State of a license to do business therein for the ensuing license year, *that is, on or prior to the commence-*

ment of the exercise of the right or privilege of entering the State and doing business therein for said license year, in order to be valid under the Fourteenth Amendment; and

(b) That the admittedly discriminatory 2% (now 4%) gross premium tax involved here was not paid by the Great Northern Life Insurance Company as a "condition precedent" to the issuance by the State of Oklahoma of a license to do business therein for the ensuing license year, *that is, on or prior to the commencement of the exercise of the right or privilege of entering Oklahoma and doing business therein for said license year*, and hence is invalid under the Fourteenth Amendment.

In support of the above contentions Amici Curiae refer to the case of *Hanover Fire Insurance Company v. Carr, County Treasurer* (formerly Harding, County Treasurer), 272 U. S. 474, 71 L. ed. 372, (reviewed on pages 50 to 58 of respondent's original brief herein), and on page 26 of their brief state:

"Although the 1919 gross premium tax law of Illinois and the Oklahoma gross premium tax law here in question impose a tax measured upon gross premiums, they are radically different in operation and effect. The material portions of the Illinois law are quoted in Appendix III. Section 13 thereof shows that the law does not in fact measure the tax on gross premiums, for the first license year. We will hereinafter illustrate and compare the operation of both laws and demonstrate that the 1919 law of Illinois is a true license fee (*condition precedent*) exacted from foreign corporations before admission for the ensuing license year, while the Oklahoma law is a

(9)

privilege tax exacted from foreign corporations after admission and for the license year ending at the time of payment."

**Amici Curiae's
Contention "(a)"**

In connection with Contention "(a)", *supra*, to-wit:

"That an admittedly discriminatory fee or tax, such as is involved here, must be paid as a 'condition precedent' to the issuance by a State of a license to do business therein for the ensuing license year, *that is, on or prior to the commencement of the exercise of the right or privilege of entering the State and doing business therein for said license year*, in order to be valid under the Fourteenth Amendment.",

it will be noted that if said contention is sound, a state law expressly imposing a discriminatory license fee or tax on a foreign corporation for the right or privilege of entering the State and doing business therein for a period of either one or twenty years would be invalid under the Fourteenth Amendment unless said law requires all of said fee or tax to be paid prior to the commencement of the exercise of said right or privilege.

For example, if said contention is sound, a State law would be invalid under the Fourteenth Amendment which expressly imposes a discriminatory license fee or tax of \$1,000.00 on a foreign corporation for the right or privilege of entering the State and doing business therein for a period of either one or twenty years, if said law provides that one-half of said fee is payable on or

(10)

prior to the commencement of said period and the other one-half payable ten days thereafter.

In support of Contention "(a)" Amici Curiae take the position that the \$200.00 "entrance fee" paid by a foreign insurance company under the provision of Section 10478 O. S. 1931 (quoted on pages 25 and 26 of respondent's original brief herein), as amended in 1941 (36 O. S. 1941 § 104), is the only fee or tax paid by it for the right or privilege of entering Oklahoma and doing business therein for the ensuing license year. This position is in direct conflict with the holding of the Supreme Court of Oklahoma in the case of *New York Life Insurance Company v. Board of Commissioners of Oklahoma County*, 155 Okla. 247, 9 Pac. (2d) 936, (reviewed on pages 44 to 46 of respondent's original brief herein), where, in construing the constitutional and statutory provisions involved here, it was held:

"In the case at bar no lump sum is designated as a license fee or privilege tax for the purpose of transacting business within the state. It seems manifest that a certain percent of the premiums collected by a foreign insurance company is an equitable mode of determining what burdens, license fee, or privilege tax should be charged to said corporation for the right or privilege to do business within the state."

Moreover, said annual \$200.00 "lump sum" payment is not only inadequate for the privilege of doing business in Oklahoma for a year by a foreign life insurance company, but it is not commensurate to the privilege granted, since one company may do far more business in Oklahoma during a license year than another. It was

probably by reason of this patent fact that the annual per centage tax on premiums was required, as stated by the Oklahoma Supreme Court in the New York Life Insurance Company case,

"for the right or privilege of doing business within the state."

Furthermore, by an examination of 28 O. S. 1941 § 111, it will be found that foreign corporations, other than insurance corporations, desiring to enter Oklahoma and do business therein for periods ranging from twenty years to perpetual existence are required to pay to the Oklahoma Secretary of State an admission fee of or tax *commensurate to the privilege conferred*, to-wit: a fee of one-tenth of one per cent of the estimated amount of capital they intend or expect to invest in Oklahoma during the then current fiscal year, and that if they thereafter invest capital in Oklahoma in excess of said estimate they are required to pay a like fee or tax thereon, that is, up to an amount not exceeding the par value of their authorized capital stock.

It is not reasonable to believe that the Oklahoma lawmakers intended to fix the admission fee of all foreign corporations, except foreign insurance corporations, in an amount commensurate to the privilege given and at the same time to fix the admission fee of insurance corporations at a "lump sum" not commensurate to the privilege given. In this connection attention is respectfully invited to the analysis of the case of *Philadelphia Fire Insurance Association v. New York*, 119 U. S. 110, 30 L. ed. 342, which appears on pages 41 to 44 of respondent's original brief herein.

Moreover, if said \$200 is the only fee or tax that can be charged a foreign life insurance company for the right or privilege of entering Oklahoma and doing business therein for a license year, *said fee or tax*, under Contention "(a)", *can be validly raised at any time by the Oklahoma Legislature* from \$200.00 to \$20,000.00, or more. Such a tax, however, would be unfair since it would not be commensurate to the privilege granted.

Inasmuch as certain assertions are made in the brief of Amici Curiae to the effect that the 2% (now 4%) annual premium tax involved here is not justified as a fee or tax *for proper regulatory purposes under the police power of the State*, respondent desires to clarify its position on said point by stating that if a tax is not paid by a foreign corporation for the right or privilege of entering a state and doing business therein, same, if discriminatory, is invalid under the 14th Amendment unless it can be justified under the police power of the State as a fee reasonably required for proper regulatory (not revenue) purposes. However, if a tax is paid by a foreign corporation for a right or privilege of entering a state and doing business therein (as here) it may be discriminatory, and it is immaterial as to whether or not it is charged for regulatory or for revenue purposes.

In support of said Contention "(a)" Amici Curiae apparently take the following position:

- (1) That it was by reason of the fact that the 1919 Illinois law mentioned in the *Hanover Fire Insurance Company case, supra*, (reviewed, as aforesaid, on pages 50 to 58 of respondent's original brief herein), provided that the 2% *annual premium tax* paid by foreign insurance,

(13)

companies doing business in Illinois was "due and payable on the first day of July" of the license year commencing on said date and ending the following June thirtieth, that is, due and payable on or before the commencement of the exercise of the right or privilege of entering said state and doing business therein for said license year, that said tax, although discriminatory, was held or treated as valid by this Court, and

(2) That it was by reason of the fact that Section 30 of the 1869 Act did not require "Every agent" of a foreign insurance company doing business in Illinois to pay the net receipts tax mentioned therein on the "net receipts" collected by their respective agencies during a license year "to the proper officer of the county, town or municipality in which the agency was established" on or before the issuance of a license to said company to do business in Illinois for the ensuing license year, that is, on or before the commencement of the exercise of the right or privilege of entering said state and doing business therein for said license year, that the net receipts tax involved in said case, which was admittedly discriminatory, was held invalid by this Court.

That the position of Amici Curiae is not sound is revealed by a careful reading of the Hanover Fire Insurance Company case, from which it appears that the true criterion as to whether a fee or tax is paid by a foreign corporation for the right or privilege of entering a state and doing business therein (and hence valid even though discriminatory) is not whether said fee or tax is paid before or after the commencement of the exercise of the right or privilege but whether said fee or tax is a

(14)

"burden imposed by the state for license or privilege to do business in the state"

or a

"tax burden which having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state."

In this connection respondent quotes the following pertinent language from the Hanover Fire Insurance Company case:

"In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state for license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind * **

"What, therefore, we have to decide here is whether the application of section 30 can be one of the conditions upon which the insurance com-

pany is admitted to do business in Illinois, or whether under the law of 1919 the authority granted by the department of trade and commerce for which the company paid two per cent of gross premiums received the previous year by it put it upon a level with domestic insurance companies doing business of the same character."

It will thus be noted that this Court did not hold or treat the 2% annual gross premium tax of the State of Illinois as valid by reason of the fact that the statutes of that state made said fee or tax "due and payable" by a foreign insurance company on or prior to the commencement of the right or privilege of entering Illinois and doing business therein for the ensuing license year, but because said fee or tax, even though discriminatory, was a

"burden imposed by the state for license, or privilege to do business in the State."

Such a tax burden, whether by the laws of the State in question made "due and payable" before or after the beginning of the ensuing license year, is assumed by the applicant foreign insurance company as a "condition precedent" to the issuance of a license thereto for said year.

Before closing this sub-head of our brief respondent desires to call attention to the fact that the principles of law announced therein are in harmony with the decision of the Circuit Court of Appeals in the instant case (136 Fed. (2d) 44-47), wherein it is held:

"It is not an essential of a privilege tax that it be paid before the exercise of the privilege. Payment

may precede or follow the exercise of the privilege, depending on which system the legislature chooses to adopt.

"In the case of *New York Life Ins. Co. v. Board of County Commissioners of Oklahoma County*, 155 Okla. 247, 249, 9 P. (2d) 936, 938, 939, 944, 82 A.L.R. 1425, the Supreme Court of Oklahoma held that the gross premiums tax was not a tax in a constitutional sense, but was a license fee or privilege tax for the privilege of doing business in the state."

"It is clear, under the Oklahoma statutes, that the license of a foreign insurance company expires on the last day of February next after its issue. Art. XIX of the Oklahoma Constitution and the Oklahoma statutes, hereinabove referred to, permit of the construction that the payment of the gross premiums tax on or before the expiration of the license year on the last day of February is exacted for the privilege of doing business in the state during that license year and as a condition precedent to the issuance of a license for the ensuing year. Such has been the uniform and long-continued construction of the executive department charged with the administration of the statutes."

**Amici Curiae's
Contention "(b)"**

"That the admittedly discriminatory 2% (now 4%) gross premium tax involved here was not paid by the Great Northern Life Insurance Company as a 'condition precedent' to the issuance by the State of Oklahoma of a license to do business therein for the ensuing license year, *that is, on or prior to the commencement of the exercise of the*

right or privilege of entering Oklahoma and doing business therein for said license year, and hence is invalid under the Fourteenth Amendment."

If *Amici Curiae's Contention "(a)"*, *supra*, is sound (which respondent denies) it does not follow that *Amici Curiae's Contention "(b)"* is likewise sound. In this connection attention is called to the fact that Sections 1 and 2, Article 19 of the Constitution of Oklahoma (quoted on pages 24 and 25 of respondent's original brief herein) do not state when the annual \$200.00 entrance fees or the annual 2% (now 4%) gross premium taxes imposed by Section 2, *supra*, on foreign life insurance companies are to be paid. Attention is also called to the fact that 36 O. S. 1941 § 101 (quoted on page 3 of Appendix I of the brief of *Amici Curiae*), is not pertinent to the payment of said fees or taxes since no mention of either thereof is made in said section. However, by an examination of Section 10478 O. S. 1931 (quoted in full on pages 25 and 26 of respondent's original brief herein), as amended in 1941 (36 O. S. 1941 § 104), it will be found that same in part provides:

"Every foreign insurance company doing business in this state under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the insurance commission, the total amount of gross premiums received in this state within the twelve months next preceding the first day of January * * * and at the same time pay the insurance commissioner an entrance fee as provided by Article XIX of the Constitution of the

State of Oklahoma, and an annual tax of two per cent on all premiums collected in this state, after all cancellations and dividends to policy holders are deducted, * * *".

Also, by an examination of Section 10477 O. S. 1931 (36 O. S. 1941 § 56), quoted in full on page 27 of respondent's original brief herein), it will be found that same in part provides:

"* * * if the Insurance Commissioner finds that the facts warrant, and that all laws applicable to said company are fully complied with, *he shall issue to said company a license or certificate of authority*, subject to all requirements and conditions of the law, to *transact business in this state*, specifying in said certificate the particular kind or kinds of insurance it is authorized to transact, and said certificate shall expire on the last day of February next after its issue."

The above statutory provisions reveal that when a foreign life insurance company makes its report for a license year, it is "at the same time" required to pay not only its annual \$200.00 entrance fee (which Amici Curiae admit is paid as a condition precedent to the issuance of a license to do business in the state for the ensuing license year) but a 2% (now 4%) gross premium tax on the premiums collected by it in Oklahoma, less proper deductions, during the preceding calendar year.

Said statutory provisions are susceptible of the construction that said annual \$200.00 fee and said annual 2% (now 4%) gross premium tax, both of which are

required to be paid by a foreign life insurance company "at the same time" it files its report "on or before the last day of February" (said payments being made prior to the commencement of the ensuing license year), are paid as a "condition precedent" to, and as a privilege tax for, the issuance of a license thereto for the ensuing license year.

Therefore, if Contention "(a)" is sound, and since it is a primary rule of statutory construction (*Chicago R. I. & P. Ry. Co. v. Beatty*, 34 Okla. 231, 118 Pac. 367), that

"Where a statute is susceptible of two constructions, one of which will uphold it, while the other will strike it down, it is the duty of the court to accept the former construction".

this Court should construe Section 10478, as amended, and Section 10477, *supra*, as requiring the payment by a foreign life insurance company *not only* of said \$200.00 "lump sum" fee *said* 2% (now 4%) gross premium tax as a condition precedent to, and as a privilege tax for, the issuance by the state of a license thereto for the ensuing license year.

This construction, respondent realizes, leaves unsettled the question as to what privilege tax should be paid by a foreign life insurance company when it desires for the first time to enter Oklahoma and do business therein from the date of its entry to the end of the then current license year, although we assume that since it would be impossible to then require said company to pay a percentage tax on its past business (since it would have

no past business), it would only be required to pay said \$200.00 "entrance fee".

SECOND PROPOSITION

THE OKLAHOMA INSURANCE COMMISSIONER DID NOT MAKE AN UNCONSTITUTIONAL OR IMPROPER APPLICATION OF THE 1941 ACT BY REASON OF THE FACT THAT HE REQUIRED FOREIGN INSURANCE COMPANIES SEEKING TO OBTAIN A LICENSE TO DO BUSINESS IN OKLAHOMA FOR THE YEAR 1942, TO PAY A FOUR PER CENT TAX ON ALL PREMIUMS, LESS PROPER DEDUCTIONS, COLLECTED BY SAID COMPANIES IN OKLAHOMA DURING THE CALENDAR YEAR, 1941.

The above proposition is set forth as the "Fifth Proposition" of respondent's original brief herein, argument thereunder being set forth on pages 58 to 63 of said brief, same being incorporated by reference herein. While said proposition is not separately discussed in the brief of Amici Curiae, same is involved therein.

This proposition, *as stated by respondent in the oral argument before this Court and as stated in our oral argument before both the District Court of Oklahoma County in the Lincoln National Life Insurance case and the United States District Court in the instant case*, presents a close question on which respondent has been unable to find a decision directly in point. We believe, however, that respondent's argument on pages 58 to 63, *supra*, of his said original brief, reasonably supports said proposition.

(21)

Also, in support of said proposition respondent desires to call attention to that part of the decision of the Circuit Court of Appeals in the instant case (136 Fed. (2d) 44-47) wherein it is stated:

"Art. XIX of the Oklahoma Constitution and the Oklahoma statutes, hereinabove referred to, permit of the construction that the payment of the gross premiums tax on or before the expiration of the license year on the last day of February is exacted for the privilege of doing business in the state during that license year and as a condition precedent to the issuance of a license for the ensuing year. Such has been the uniform and long-continued construction of the executive department charged with the administration of the statutes. * * *

"The Insurance Company's license which was issued in 1940 expired February 28, 1941. March 1, 1941, to February 28, 1942, constituted a new license year and a new admission into the state. It was within the power of the state to change the conditions of admission at any time as to future license years and the Insurance Company was not entitled to a license for a license year beginning after the effective date of the amendment increasing the gross premiums tax, without paying such increased tax for that year."

It will be noted, however, that in the foot-note of said case, relating to the above quoted excerpt therefrom, it is stated:

"The question of the validity of the increase in the tax on gross premiums received between January 1, 1941, and April 25,

1941, is not raised and we express no opinion with respect thereto."

In this connection attention is called to the fact that while the question referred to in said foot-note was raised by petitioner in its "Supplement to Complaint" (R-17-18), said question, as stated in said foot-note, was not raised by petitioner in it's brief in the Circuit Court of Appeals and is not raised in petitioner's original or reply brief in this Court. Neither is it raised by Amici Curiae.

In relation, however, to the real question raised by the instant proposition it will be noted that if the Circuit Court of Appeals was correct in holding (said holding being in conformity with the administrative interpretation of the Oklahoma Insurance Department for the past 33 years — Stip. R-20 to 22, the holding of the United States District Court in the instant case — R-29 and 30, and the holding of the Oklahoma County District Court in the Lincoln National Life Insurance Company case—R-36 and 37) that the payment of the gross premium tax involved here on or before the expiration of the license year 1941, was exacted

"for the privilege of doing business in the state during that license year and as a condition precedent to the issuance of a license for for the ensuing year.."

it was proper for the Oklahoma Insurance Commissioner to require petitioner to pay said increased tax (4%) on the premiums it collected in Oklahoma, less proper deductions, during the calendar year 1941, before he

issued to it a license for the license year beginning March 1, 1942, since, as stated by the Circuit Court of Appeals:

"It was within the power of the state to change the conditions of admission at any time as to future license years and the Insurance Company was not entitled to a license for a license year beginning after the effective date of the amendment increasing the gross premiums tax, without paying such increased tax for that year."

This does not mean, however, that if petitioner had not sought a license for the license year beginning March 1, 1942, it would have been required to pay a tax of 4% (rather than 2%) on the premiums it had collected during the calendar year 1941 for the privilege of having been permitted to do business in Oklahoma during the license year beginning March 1, 1941, at which time the gross premium tax was fixed at 2%, but it does mean that since petitioner sought a license for the year beginning March 1, 1942, at which time said premium tax had been increased to 4%, it was properly required to pay, as a condition precedent to securing a license for said year, a tax of 4% on the premiums it collected in Oklahoma, less proper deductions, during the calendar year 1941.

Moreover, if *Amici Curiae's* Contention "(a)" is sound (which respondent denies, as aforesaid), it does not mean that the 4% tax for the license year beginning March 1, 1942 is invalid, since in such case Sections 10478 O. S. 1931, as amended, and Section 10477 of said statutes (the material parts of which are heretofore quoted) should be construed, as stated in respondent's argument herein under the sub-head "*Amici Curiae's*,

Contention "(b)", as requiring said tax to be paid as a "condition precedent" to the issuance of a license for the ensuing license year.

C O N C L U S I O N

In conclusion respondent desires to state that he fully agrees with the proposition that a State can not lawfully require a foreign insurance company to agree to pay an invalid or discriminatory tax after it becomes and while it remains a citizen of the State. In this connection respondent has always construed that part of Section 1, Article 19 of the Constitution of Oklahoma, which provides that foreign insurance companies granted a license to do business in Oklahoma

"shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license."

as applying only to valid taxes or fees, such as valid ad valorem taxes on real or personal property. In this connection it will be noted that in setting forth respondent's explanation of the "Issuance of Original License" and "Issuance of License for Succeeding Years" (pages 29 to 32 of respondent's original brief herein) it was expressly stated in the concluding paragraphs, respectively, of said sub-heads that such a license when issued remains in effect to and including the next succeeding last day of February

"unless a refusal of said company to pay valid taxes or fees imposed upon it 'by law or act of the Legislature', such as a refusal to pay *valid ad valorem* taxes on its real or personal property, 'shall work a forfeiture of such license' as provided in Section 1, Article 19, *supra*."

Moreover, the State of Oklahoma is not attempting to require petitioner to pay an invalid or discriminatory tax *after it becomes and while it remains a citizen of the State*, to-wit: after it enters the State for a license year, since the premium tax involved here is required to be paid for the right or privilege of becoming a citizen of the State for said license year and not as a tax on it as a citizen thereof.

In this connection it will be noted that if said tax is payable by a foreign insurance company at the end of a license year for the privilege of having been permitted to do business in Oklahoma during said year, a failure to pay said tax will not forfeit its license since same automatically expires on the last day of said year, and if said tax is required to be paid as a condition precedent to the issuance of a license for the ensuing license year, a failure to pay said tax will not forfeit the license since same will never be issued.

(26)

In consideration of the two propositions, above presented, respondent respectfully asks the Court to affirm the decisions of the District and Circuit Courts herein, and to render judgment in favor of respondent and against petitioner.

Respectfully submitted,

RANDELL S. COBB,

Attorney General of Oklahoma;

FRED HANSEN,

First Assistant Attorney General
of Oklahoma;

ANDY CROSBY, JR.,

Attorneys for Respondent.

February, 1944.

FILE COPY

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CHARLES ELIJAH GINSBURG
CLEAR

No. 235

Supreme Court of the United States

(OCTOBER TERM, 1943)

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

VERSUS

JESS G. READ, INSURANCE COMMISSIONER
FOR THE STATE OF OKLAHOMA,
Respondent.

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE AND BRIEF AMICI CURIAE**

JOHN H. MILEY,
RUSSELL V. JOHNSON,
1039 First National Building,
Oklahoma City, Oklahoma,
Amici Curiae.

January, 1944.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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**OFFICIAL REPORT OF OPINION DELIVERED IN THE
COURT BELOW**

Great Northern Life Insurance Co. v. Read Insurance
Com'r of Oklahoma (C. C. A. 10) 136 Fed. (2d) 44.

Supreme Court of the United States

OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

VERSUS

JESS G. READ, INSURANCE COMMISSIONER
FOR THE STATE OF OKLAHOMA,
Respondent.

**MOTION FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE.**

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

COME NOW John H. Miley and Russell V. Johnson, and move this Honorable Court for leave to file in this cause the attached brief as *amici curiae*. In support of said motion movants allege:

1. This cause challenges the validity under the equal protection clause of the Fourteenth Amendment to the Federal Constitution of the 1941—4% insurance premium tax law of the State of Oklahoma.
2. Great public interests are involved and many persons will be affected by the precedent to be established herein.

3. The cause of *Lincoln National Life Insurance Company, a corporation, Plaintiff in Error, v. Jess G. Read, Insurance Commissioner for the State of Oklahoma, and A. S. J. Shaw, State Treasurer for the State of Oklahoma, Defendants in Error*, No. 31338, is pending in the Supreme Court of the State of Oklahoma, wherein the issues as to the validity of such tax are identical with the issues in this cause; that said cause pending in the Supreme Court of the State of Oklahoma, whether decided before or after the decision in this cause, will be affected by the decision of this cause.
4. The judgment of the District Court of the State of Oklahoma in and for Oklahoma County, from which the appeal was taken in said cause pending in the Supreme Court of the State of Oklahoma, was introduced in the record of this cause by the respondent herein and constitutes a part of the record herein (R. 35).
5. Movants are of counsel of record for plaintiff in error and interested in said cause pending in the Supreme Court of the State of Oklahoma.
6. Movants have secured written consent of counsel for the petitioner herein, to the appearance and filing of a brief herein by movants as *amici curiae*, but the respondent declines to give his consent.

JOHN H. MILEY,
RUSSELL V. JOHNSON,

1039 First National Building,
Oklahoma City 2, Oklahoma,
Movants.

Supreme Court of the United States

OCTOBER TERM, 1943

No. 235

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

VERSUS

JESS G. READ, INSURANCE COMMISSIONER FOR THE
STATE OF OKLAHOMA,
Respondent.

BRIEF AMICI CURIAE

STATEMENT

Amici curiae are of counsel of record in cause No. 31338, styled "*The Lincoln National Life Insurance Company, a corporation, Plaintiff in Error, v. Jess G. Read, the Insurance Commissioner of the State of Oklahoma; and A. S. J. Shaw, State Treasurer of the State of Oklahoma, Defendants in Error,*" pending in the Supreme Court of Oklahoma, wherein they contend that the 4% insurance premium tax law of Oklahoma denies to foreign insurance companies the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. Said cause is an appeal from the judgment of the District Court of the State of Oklahoma in and for

Oklahoma County, which judgment was introduced in the record of this cause (R. 35-38). The issues in said cause pending in the Supreme Court of Oklahoma and in this cause as to the legal effect of the 4% insurance premium tax law of Oklahoma in the light of the equal protection clause of the Federal Constitution are identical. Therefore this brief will be limited to that question.

This cause originated in the United States District Court for the Western District of Oklahoma upon the complaint of the petitioner (R. 3). From an adverse judgment in said court the petitioner perfected an appeal to the Circuit Court of Appeals for the Tenth Circuit, where the judgment of the lower court was affirmed (R. 39-47; 136 Fed. [2d] 44). The petition herein for a writ of *certiorari* to the United States Circuit Court of Appeals for the Tenth Circuit was granted by this Court by order filed October 11th, 1943 (R. 48).

The record herein reveals the following facts about which no controversy exists:

The petitioner is a corporation organized under the laws of Wisconsin. It is authorized to issue policies of life, health and disability insurance. In December, 1922 and each year thereafter to 1942, inclusive, the Insurance Commissioner of Oklahoma issued to it a license to do business in the State of Oklahoma. Each of such license certificates by its terms expired on the last day of February next after its issue. (See opinion of Circuit Court of Appeals, R. 39; complaint, R. 3-4; answer, R. 11-12; exhibit "B" to stipulation of facts, R. 23.) It has annually paid

to respondent the fee required by law (denominated license or entrance fee) in the sum of \$300.00 (R. 4, 12). During the period that petitioner has done business in Oklahoma it has built up a large and profitable business which cannot be leased or sold to other persons (R. 4, 12).

Section 2, Article XIX, of the Constitution of Oklahoma (*infra*) requires that, until otherwise provided by law, each foreign insurance company doing business in the state pay an annual entrance fee in a prescribed amount (\$25.00 to \$200.00, according to classification) and an annual tax of 2% on all premiums collected in the state, less specified deductions, and a tax of \$3.00 on each local agent.

Chapter 21, Article 1, Section 22, of the General Insurance Act of 1909, Section 10478, Okla. Stat. 1931 (Appendix I), requires that every foreign insurance company doing business in Oklahoma shall, annually, on or before the last day of February, report to the Insurance Commissioner the total amount of gross premiums received in the State of Oklahoma during the preceding calendar year, and at the same time pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Oklahoma Constitution and an annual tax of 2% on all premiums collected in the State, less specified deductions, and an annual tax of \$3.00 on each local agent.

Section 10478, Okla. Stat. 1931, *supra*, was amended by the Session Laws of Oklahoma, 1941, page 121 (36 Okla. Stat. 1941, sec. 104), which amendment became effective April 25, 1941 (Appendix II). The amendment

increased the rate of the tax imposed by the former statute from to 2% to 4%. The provisions of the former statute were not otherwise changed in any material respect.

The opinion of the Circuit Court of Appeals determined that no gross premium tax is exacted from domestic insurance companies in Oklahoma (R. 41). Such determination conforms with the laws of Oklahoma and the admissions of the parties herein (R. 5, 13).

The statutes of Oklahoma prescribing the conditions precedent to admission of foreign insurance companies into Oklahoma and regulations governing such companies are included in Appendix I hereto attached. Consideration of such statutes is necessary in determining the question before the Court, and special attention will herein-after be devoted thereto.

It is admitted by the stipulation of facts (R. 20-23) and the trial court found (R. 23-27) that domestic companies competing in Oklahoma with petitioner do not pay any kind or type of taxes which are not likewise paid by petitioner, except that said competing domestic insurance companies pay an annual income tax, from which tax petitioner is exempt, the amount of which tax, however, is approximately only one-twentieth of the amount a 4% tax would bring on the premiums collected by said companies in Oklahoma, less proper deductions; that the expenses of the Oklahoma Insurance Department since November, 16, 1907 (statehood), have been approximately 3.55% of its total receipts from the 2% insurance premium tax and the annual entrance and agents' fees collected from

foreign insurance companies; that since December 31, 1941 (the 4% insurance premium tax became effective April 25, 1941), said expenses are approximately 2% of the gross receipts thereof.

The decision of the Circuit Court of Appeals conforming to the stipulation of the parties reveals: Since 1909, it has been the uniform administrative practice of the Insurance Commissioner in Oklahoma that when a foreign insurance company desires for the first time to do business in Oklahoma, it is required to apply for a license, to expire on the last day of February next after its issue, and on or before the date of the expiration of its first license to pay the tax under the law in question on business done from the date of issuance of its first license to the end of the calendar year in which the license was issued; and when said company desires to renew its first license or any subsequent annual license, it is required (a) to apply on or before the expiration of its current license, for a renewal license covering the ensuing license year, and (b) to pay said tax that is due for the current license year, as a condition precedent to the issuance of the renewal license, and (c) to pay on or before the expiration of the renewal license the tax under the law in question on business done during the preceding calendar year; that since 1909, the Insurance Commissioner of Oklahoma has uniformly interpreted the tax law in question as requiring a license to expire on the last day of February next after its issue, and in issuing renewal licenses as requiring the payment on or before the expiration of the renewal license of the tax under the law in question for the privilege en-

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joyed before the expiration of the renewal license (R. 40-41; 20-22).

It is admitted (R. 5, 12) that on February 28, 1942, petitioner paid under protest the 4% insurance premium tax required by 36 Okla. Stat. 1941, sec. 104, *supra*. Petitioner brought this action to recover such tax and alleged that the laws of Oklahoma under which such tax was levied and collected are invalid and in contravention of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States R. 4-6). From an adverse judgment the petitioner appealed to the Circuit Court of Appeals, where the judgment was affirmed (R. 39).

ERRORS HERE URGED ARE

1. Section 1, Chapter 1-a, Title 36, Session Laws of Oklahoma 1941 (Sec. 104, Tit. 36, Okla. Stat. 1941), is unconstitutional in that it denies to petitioner the equal protection of the laws and takes its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.
2. The levy and collection of the tax by the respondent, purporting to act pursuant to said statute, is unconstitutional upon the same grounds.
3. The judgment and the opinion of the United States Circuit Court of Appeals, Tenth Circuit, are in error in holding the statute valid and the tax here for review valid, notwithstanding the provisions of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

I.

The rules and principles announced by the United States Supreme Court in the Hanover case reveal that the tax law of Oklahoma here in question denies to foreign corporations in Oklahoma the equal protection of the laws.

Hanover Fire Insurance Co. v. Harding, 272 U. S. 494, 71 L. ed. 372.

(A) *This Court will accept the character of the tax as determinated by the State Court, but will exercise its independent judgment in determining whether the tax with the meaning given violated the Federal Constitution.*

Hanover Fire Insurance Co. v. Harding, supra:

- a. The net receipts tax law of Illinois had been characterized by the latest expression of the Illinois courts as a privilege tax.
- b. This Court although bound by the construction that the state court may put upon the statute is not bound by the characterization of it so far as that characterization may bear upon the question of its constitutional effect.
- c. The validity of the tax, whatever its character may be, depends upon its operation and effect as applied and enforced.

- (B) *The question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations.*

Hanover Fire Insurance Co. v. Harding, supra:

- a. After its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind.

- (C) *A foreign insurance company is admitted into the State and put on a level with domestic insurance companies by compliance with valid CONDITIONS PRECEDENT.*

Hanover Fire Insurance Co. v. Harding, supra:

- a. Conditions precedent are those requirements that are capable of being fulfilled before admission, such as payment of license fee, showing prescribed amount of capital, appointment of service agent, and filing of reports, financial statement and charter.
- b. A privilege tax may be made to apply either as a condition precedent to admission (license fee) or as a tax after admission.
- c. The 1919 gross premium tax law of Illinois was a privilege tax and required the payment of a sum certain, before the license was issued for the privilege to be exercised following admission and was a condition precedent. (See appendix III and analysis in argument).
- d. The net receipts tax law of Illinois was a privilege tax based on the benefits derived from business done and was paid after the privilege was exercised and could not be a condition precedent.

- (D) *Tax laws that apply to foreign corporations after they are admitted into the State must conform to the equal protection clause of the Fourteenth Amendment.*

Hanover Fire Insurance Co. v. Harding, supra:

- A law that applies a tax after admission is to be considered a law for the purpose of raising revenue and must conform to the equal protection clause.

- (E) *A foreign corporation licensed for one year at a time cannot be required to show past compliance with a tax law that violates the Federal Constitution, under the guise that the payment of the tax is a condition precedent to the renewal of its annual license.*

Marion L. Frost, et al. v. Railroad Commission of the State of California, 271 U. S. 583.

Hanover Fire Insurance Co. v. Harding, supra:

- The foreign insurance company in the Hanover case was licensed for one year at a time, but the court held that whether the license is indefinite or for one year at a time, the principle is the same that, pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens.
- A foreign corporation cannot be required to agree to submit to invalid tax laws as a condition to the issuance of original or renewal licenses.
- The state cannot relieve itself from granting the equal protection of the laws to a foreign corporation by requiring such corporations to pay an invalid tax as a condition precedent to the renewal of an annual license.

II

The gross premium tax law of Oklahoma applies after issuance of each annual license. Since it is exacted for the privilege already exercised, its payment cannot be required as a valid condition precedent to the annual license renewal.

(A) *Provisions of Constitution and Statutes of Oklahoma affecting determination of issue herein.*

- a. The constitution and statutes of Oklahoma require the payment of a license fee in a prescribed amount and applies the gross premium tax after the license is issued. (See analysis in argument.)
- b. Gross premium tax laws such as the law of Oklahoma impose taxes, payable at the end of the license period for the privilege previously exercised for it cannot be presumed that the legislature intended to exempt a foreign insurance company from taxation upon its first year's business. It is primarily a license tax and is unlawfully enforced as a condition precedent in the event of a renewal of the license.

Pacific Mutual Life Insurance Co. v. Hobbs (Kan.),
103 Pac. (2d) 854.

- c. The general insurance act of 1909 prescribes the conditions precedent to admission of foreign insurance companies into Oklahoma, and foreign insurance companies are admitted under the provisions thereof before the gross premium tax law can apply. (See Appendix I, II and Analysis in Argument.)

(B) *Oklahoma decision construing the Oklahoma gross premium tax law.*

- a. The gross premium tax law of Oklahoma imposes a privilege tax which is subject to no limitation except that it shall not conflict with the Federal Constitution.

New York Life Insurance Co. v. Board of County Commissioners, 155 Okla. 247, 9 Pac. (2d) 936.

(C) *Illustration of uniform administrative practice and construction in Oklahoma according to findings of Circuit Court of Appeals.*

(See illustration in Argument.)

(D) *Illustration of operation of the 1919 Illinois gross premium tax law involved in the Hanover case.*

(See illustration in Argument.)

- a. The illustration of the operation of the 1919 insurance premium tax law of Illinois involved in the Hanover case and the illustration of the operation of the gross premium tax law of Oklahoma in question here, reveals that said laws are radically different in type and manner of application. The said Illinois law applies before admissions and is a license fee and the said Oklahoma law applies after admission and is a license tax.

(E) *Analysis of opinion of the Circuit Court of Appeals.*

(See analysis in Argument.)

- a. The opinion makes no mention of the provisions of Sec. 18 of the General Insurance Act of 1909

- (see Appendix I) which prescribes the conditions of admission of foreign companies in Oklahoma.
- b. The opinion holds that the gross premium tax law of Oklahoma applies after admission and as a condition precedent in the event of a renewal of the annual license.
 - c. The opinion does not discuss the terms and provisions of the 1919 gross premium tax law of Illinois and makes no comparison of that law with the gross premium tax law of Oklahoma in question here. The court was obviously misled in its consideration of the Hanover case by the said 1919 law of Illinois that was incidentally involved but not questioned in the Hanover case.

III

The gross premium tax of Oklahoma imposes a discriminatory tax, and the constitutional necessity for equal protection of the laws cannot be avoided under the guise that payment of such tax is a condition precedent to the issuance of renewal licenses.

Hanover Fire Insurance Co. v. Harding, supra:

- a. It is obviously the view of the Circuit Court of Appeals that the constitutional necessity for equal protection of the laws is avoided under the Oklahoma gross premium tax law here in question, by adopting the theory that failure to pay the tax that is exacted at the end of the annual license period, justifies a refusal to grant a renewal license for the ensuing license year.

Great Northern Life Insurance Co. v. Read, 136 Fed. (2d) 44.

(A) *Discussion of cases cited by the Circuit Court of Appeals in support of its theory.*

(See analysis of those cases in Argument.)

a. The authorities relied upon by the Circuit Court of Appeals in support of the above mentioned theory were decided long prior to the decision in the Hanover case, and are predicated upon cases that either arose before the 14th Amendment to the Federal constitution became effective or did not involve the 14th Amendment.

(B) *The theory adopted by the Circuit Court of Appeals is repugnant to the principles announced in the Hanover case.*

Hanover Fire Insurance Co. v. Harding, supra:

- a. The case of *Fire Association of Philadelphia v. New York*, 119 U. S. 110, primarily relied upon by the Circuit Court of Appeals and the class of cases cited therein in support of the theory adopted by the Circuit Court of Appeals, were considered by this Court in 1910 in the case of *Southern Railway Co. v. Green*, 216 U. S. 400.
- b. *Hanover Fire Insurance Co. v. Harding, supra*, was decided in 1926 and some 58 years after the 14th Amendment went into effect. In that case the defendant in error cited and relied upon *Fire Association of Philadelphia v. New York, supra*, and cases therein cited, but this Court observed that by later decisions the state was precluded from exacting as a condition of foreign corporations engaging in business within its limits, that the rights secured to such corporations by the Federal constitution might be infringed.

- c. The gross premium tax law of Oklahoma offends the Federal constitution and cannot be justified as a condition precedent to renewals of licenses issued for only one year at a time.

Hanover Fire Insurance Co. v. Harding, supra.

Sneed v. Shaffer Oil & Refining Co. (C. C. A. 8th), 35 Fed. (2d) 21.

(C) *Valid conditions precedent under Oklahoma law.*
(See analysis in Argument.)

- a. The valid conditions precedent to admission into the state under the law of Oklahoma are the payment of the license fee in the definite sum prescribed by Sec. 2, Art. XIX of the Constitution and compliance with Secs. 11 and 18 of the General Insurance Act of 1909.
(See Appendix I.)

(D) *The operation and effect of the gross premium tax law of Oklahoma precludes its recognition as a valid condition precedent to the issuance of renewal licenses.*

Hanover Fire Insurance Company v. Harding, supra.

- a. The Oklahoma gross premium tax law in question applies after the issuance of the license to the foreign insurance corporation, whether the license is an original or a renewal license, according to its own terms, (see Appendix II), Sec. 2, Art. XIX of the Constitution of Oklahoma, the General Insurance Act of 1909 (Appendix I), the uniform administrative practice in Oklahoma and the decision of the Circuit Court of Appeals.
- b. The Oklahoma gross premium tax law in question cannot constitute a valid condition precedent to

the renewal of annual licenses, for the reason that it violates the 14th Amendment to the Federal Constitution.

Hanover Fire Insurance Company v. Harding, supra.

IV

The 4% gross premium tax of Oklahoma and the unconstitutional net receipts tax in question in the Hanover case are identical in character and method of application.

(See analysis in Argument.)

V

The gross premium tax laws of other states afford no authority in the determination of the question in this case.

CONCLUSION

- a. The guaranties of the Federal Constitution should not be permitted to be avoided through disguise and manipulation.

Marion L. Frost, et al. v. Railroad Commission of the State of California, supra.

- b. If the State of Oklahoma can at will deprive foreign insurance corporations of the equal protection of the laws, then it in effect nullifies the Constitution of the United States.

Doyle v. Continental Insurance Co., 94 U. S. 535.

ARGUMENT

The legal effect of the law in question and the uniform administrative practice thereunder, in the light of the requirements of the Fourteenth Amendment to the Federal Constitution, is the primary question here for determination.

We shall hereinafter subject the tax law in question to the test prescribed by the decisions of this Court and demonstrate that the decision of the Circuit Court of Appeals erroneously fails to follow the rules prescribed. In so doing we shall demonstrate that the tax law in question violates the Federal Constitution.

I

The rules and principles announced by the United States Supreme Court in the Hanover case reveal that the tax law of Oklahoma here in question denies to foreign corporations in Oklahoma the equal protection of the laws.

The leading case on the questions here presented is *Hanover Fire Ins. Co. v. Harding* (*Hanover Fire Insurance Co. v. Carr*), 272 U. S. 494, 71 L. ed. 372, decided by this Court in 1926. It is thoroughly germane and in point. It is supported by numerous authorities of this Court which are therein cited. For convenience we shall refer to it as "the Hanover case." (All quotations herein from the Hanover case will be followed by the page number where that quotation appears in 272 U. S.) The decision of the Circuit Court of Appeals states that the Hanover case is dis-

tinguishable from the instant case. We contend that the Circuit Court of Appeals in so holding failed to regard the substance of the Oklahoma law and its effect as applied and enforced by the State; that said Court was misled by the form in which the taxing scheme is cast and its character as adopted by the Supreme Court of Oklahoma; that said Court did not in its opinion compare the terms and provisions of the 1919 gross premium tax law of Illinois, incidentally involved in the Hanover case with the terms and provisions of the Oklahoma gross premium tax law in question here. Therefore we shall discard brevity in the consideration of the Hanover case.

- (A) *This Court will accept the character of the tax as determined by the State Court, but will exercise its independent judgment in determining whether the tax with the meaning given violated the Federal Constitution.*

The tax in question in the Hanover case was imposed by Section 30 of the Fire and Marine Insurance Act of 1869 (Cahill's Ill. Rev. Stat. 1925, Chap. 73, Sec. 159, p. 1405), against foreign fire, marine, and inland navigation insurance companies. Section 30 provided that the net receipts of such companies should be subject to the same rate of taxation that other personal property was subject to at the place where located. The rate of tax applicable to personal property was adopted as a basis for computing the tax imposed by Section 30. *People v. Kent*, (Ill.) 133 N. E. 276. There were in Illinois domestic insurance companies doing business in all of such risks, and they paid no tax on net receipts.

As shown by the Hanover case (pages 504-505), the laws of Illinois provided that the assessment of personal property was to be arrived at by taking one-half of the fair cash value of the property. The above decision further shows that by many years' custom in the State of Illinois, the fair cash value which was used in computing the assessed valuation was reduced to 60% prior to the computation of the assessed value, so that in practice the actual assessed value of personal property was only 30% of the fair cash value of the property.

The Supreme Court of Illinois for many years had held that the net receipts tax was a tax on personal property. In practice the net receipts had been treated as personal property, and their assessment was by equalization and debasement reduced from full value as all other personal property until 1921.

In 1921 the Supreme Court of Illinois in *People ex rel. Chicago v. Kent*, 133 N. E. 276, and in 1923 in *People ex rel. Chicago v. Barrett*, 139 N. E. 903, held that said net receipts tax is a tax on the business of insurance and not a personal property tax. The Hanover case, in dealing with those cases, referred to the tax as "an occupation tax."

The Supreme Court of Illinois in the Hanover case, 148 N. E. 23, in that regard said:

"The tax provided by section 30 does not purport to be a property tax. * * * It is a tax on the amount of business done, and for the privilege of continuing in such business and the net receipts of such business are used as the basis in determining that tax. * * *. A

tax on business, as provided in this act, is not, as argued, to be distinguished from a privilege tax."

Whether the term used is "occupation tax," "business tax," "privilege tax," "license tax," or "franchise tax," it remains an excise charged for the privilege of doing business, and *all of such taxes are of the same essential character.* Witness "Cooley on Taxation":

"Taxes are either (1) capitation or poll taxes, (2) taxes on property, or (3) excise taxes. The first two are generally classified as direct taxes and the third as indirect taxes. Another classification is as (a) specific and (b) ad valorem." Cooley Taxation (4th ed.), Vol. 1, page 118.

"An excise tax, using the term in its broad meaning as opposed to a property tax, includes taxes sometimes designated by statutes or referred to as privilege taxes, license taxes, occupation taxes, and business taxes. There is no clear line of demarcation between so-called 'license,' 'occupation,' and 'privilege' taxes. In the case of corporations such taxes are often referred to as franchise taxes.

"Sometimes the term 'license fee' is used to distinguish an exercise of the police power from an exercise of the taxing power referred to as a 'license tax.'" Cooley Taxation (4th ed.), Vol. 1, pages 129-131.

As indicated above, only the "license fee" is distinguishable from the various excises. Whether the exaction is a valid excise tax, as distinguished from a valid license or admission fee, involves the inquiry regarding the oper-

ation and effect of the tax law. That is the question concerning the nature of the tax which is material in testing whether such tax violates the Fourteenth Amendment to the Federal Constitution.

The assessment of net receipts for the year 1922, involved in the Hanover case, was on the basis of 100% of the net receipts. Therefore, at the time the Hanoyer case was decided by the United States Supreme Court, the said net receipts tax had definitely been characterized by the Supreme Court of Illinois as a business or occupation tax. In that regard this Court said:

"The situation then is that a foreign fire, marine and inland navigation insurance company like the petitioner must pay at a rate per centum equivalent to that imposed on personal property a tax on the cash amount or 100 per cent of its net receipts from all its insurance business. * * * (p. 506).

"It is true that the interpretation put upon such a tax law of a state by its Supreme Court is binding upon this Court as to its meaning, but it is not true that this Court in accepting the meaning thus given may not exercise its independent judgment in determining whether with the meaning given, its effect would not involve a violation of the Federal Constitution. As said by this Court in *St. Louis, Southwestern R. Co. v. Arkansas*, 235 U. S. 350, at page 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99, where the question was whether a tax law violated the equal protection clause of the 14th Amendment:

"Upon the mere question of construction we are, of course, concluded by the decision of the state court of last resort. But when the question is whether a tax

imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state.' (pp. 509-510).

"While we may not question the meaning of the tax law as interpreted by the state court in the manner and effect in which it is to be enforced, we must re-examine the question passed upon by the state court as to whether the law complained of is a part of the condition upon which admission to do business of the state is permitted and is merely a regulating license by the state to protect the state and its citizens in dealing with such corporation, or whether it is a tax law for the purpose of securing contributions to the revenue of the state as they are made by other taxpayers of the state" (pp. 510-511).

The Court also referred to one of its former decisions wherein it was said:

"The Supreme Court justified the imposition as an occupation tax—that is, as we understand it, a tax upon the occupation of the defendant. But this Court, although bound by the construction that the Supreme Court may put upon the statute, is not bound by the characterization of it so far as that characterization may bear upon the question of its constitutional effect" (p. 510).

Then the Court, in passing upon the discriminatory nature of the tax, said:

"Under the previous decisions of the Supreme Court

of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations. * * *. But an occupation tax imposed upon 100 per cent of the net receipts of foreign insurance companies admitted to do business in Illinois is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent of the full value of that property. It is a denial of the equal protection of the laws" (pp. 516-517).

The above quotations from the Hanover case clearly reveal: Section 30 had been characterized by the Supreme Court of Illinois first as a property tax and finally as an occupation or privilege tax. The provisions of the law at all times remained the same. The United States Supreme Court was bound to accept the law as imposing a privilege or occupation tax since that was its character at the time, according to the Supreme Court of Illinois. However, its validity either as a property or privilege tax depended upon its effect as applied and enforced. When the law was held to impose a privilege tax as distinguished from a property tax under former decisions, the result that followed was an increase in the *rate of the tax* and the exactions from foreign insurance companies thereunder to such a point as to constitute a heavy discrimination in favor of domestic insurance companies.

(B) *The question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations.*

The Hanover case (pp. 502-503) reveals that the said act of 1869 of the State of Illinois (of which Section 30 there in question was a part), before admitting foreign insurance companies into the state, required that such companies have a prescribed amount of capital; appoint a service agent in the state; file a copy of its charter and a statement of its financial condition and last annual report; and deposit certain securities within the state. It further required annual certificates or licenses to transact business and subjected any one violating the act to a penalty not exceeding \$500.00. It required such companies to make annual reports of their condition and affairs and the Insurance Superintendent was given authority to investigate the affairs of such companies and, if unsound, to close up the business of the company..

The Hanover case further reveals (pp. 503-504) that Illinois in 1919 imposed upon foreign insurance companies a 2% gross premium tax and provided that said premium tax should not prohibit the collection of the net receipts tax authorized by Section 30 of the act of 1869. The same 1919 statute further, provided for the suspension of such companies and the revocation of their licenses upon their failure or neglect to make any report or failure to pay any tax assessment within thirty days after the same became due. The 1919 insurance premium tax of Illinois clearly

operates as a condition precedent to admission into the State of Illinois (see Appendix III).

The text of the 1919 gross premium tax law of Illinois is not included in the opinion of the Court in the Hanover case. The operation and effect of that law was obviously understood by the Court and all counsel involved in the case, but an analysis of the opinion in the Hanover case without an understanding of the terms and provisions of the 1919 gross premium tax law of Illinois can very easily result in the error found in the decision of the Circuit Court of Appeals. Although the 1919 gross premium tax law of Illinois and the Oklahoma gross premium tax law here in question impose a tax measured upon gross premiums, they are radically different in operation and effect. The material portions of the Illinois law are quoted in Appendix III. Section 13 thereof shows that the law does not in fact measure the tax on gross premiums, for the first license year. We will hereinafter illustrate and compare the operation of both laws and demonstrate that the 1919 law of Illinois is a true license fee (condition precedent) exacted from foreign corporations before admission for the ensuing license year, while the Oklahoma law is a privilege tax exacted from foreign corporations after admission and for the license year ending at the time of payment.

The foreign insurance company involved in the Hanover case questioned the said net receipts tax under Section 30 but complied with the other requirements of the said act of 1869 and paid the 2% premium tax as provided by the act of 1919. It insisted that under the previous

practice and proper construction of Section 30 as a property tax with due equalization and debasement, the tax assessed upon its net receipts should have been \$2,155.24, and that this, if anything, was all that should be collected from it. The Supreme Court of Illinois affirmed the decree of the Superior Court, which denied equalization and debasement of the net receipts as personal property, but corrected the amount of net receipts reported by the Board of Review and forbade the collection of a tax of more than \$7,184.18.

The line of demarcation separating foreign corporations that are without the equal protection clause from those that come within it was graphically depicted by MR. CHIEF JUSTICE TAFT in the Hanover case, where it was said:

"In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the 14th Amendment, a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequalities as between the foreign corporations and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment, but after its admis-

sion, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind.

*"In this class of cases, therefore, the question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations in engaging in business within the state. To leave the determination of such a question finally to a state court would be to deprive this court of its independent judgment in determining whether a Federal constitutional limitation has been infringed. * * *" (pp. 510-511).*

- (C) *A foreign insurance company is admitted into the State and put on a level with domestic insurance companies by compliance with valid CONDITIONS PRECEDENT.*

The Hanover case then proceeded to show when the foreign insurance company in that case was received into the State of Illinois and put on a level with all other insurance companies of the same kind. That question was considered in the following analysis by the Court:

*"What, therefore, we have to decide here is * * * whether under the Law of 1919 the authority granted by the Department of Trade and Commerce for which the company paid 2% of gross premiums received the previous year by it put it upon a level with domestic insurance companies doing business of the same character. * * *" (pp. 511-512). By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign, within the state * * * (p. 515).*

The Court properly considered the requirements of the 1919 2% gross insurance premium tax law of Illinois as conditions precedent to admission of foreign insurance companies into the State of Illinois. The text of that law was not quoted in the opinion. Its operation as a condition precedent to admission of foreign insurance companies into Illinois was obvious to all counsel involved in the case. The Court, in outlining the conditions precedent to admission into the State, made brief reference thereto. That phase of the Hanover case can easily result in a misunderstanding and improper application of the rules announced in the Hanover case when the gross insurance premium tax law of Oklahoma is subjected to the test prescribed by that case.

The Circuit Court of Appeals in its analysis of the Hanover case (R. 44-46) shows that at the time the Hanover case was decided the invalid tax under Section 30 (net receipts tax of Illinois) was an occupation tax, that the tax under the 1919 law of Illinois was a privilege tax; that the tax under the Oklahoma law in question is a privilege tax. The tax under the three laws just mentioned are excises and cannot be distinguished in the light of the equal protection clause of the Federal Constitution by the mere designation as "occupation" or "privilege" tax, as we have hereinabove shown under Proposition I (A). In subjecting such laws to the test of the equal protection clause, the distinction is to be found in the determination of whether the tax under the law, whatever is character may be, applies before or after the foreign insurance company receives its license to do business in the

State, as shown under Propositions I (C) and I (D) herein.

Although the decision of the Circuit Court of Appeals (R. 44-46) correctly reveals that the 1919 gross premium tax law of Illinois and the gross premium tax law of Oklahoma in question impose a tax for the privilege of doing business in the respective states, it makes no attempt whatever to compare the terms and provisions of these laws or to demonstrate how and when the tax under the two laws is exacted and paid in relation to the date of admission of foreign corporations into the State. The Circuit Court of Appeals apparently became satisfied that the effect of the tax law of Oklahoma in question was the same as the 1919 tax law of Illinois, when it found that the tax under both laws was measured upon gross premiums and was for the privilege of doing business in the respective states. But those are not the decisive factors, according to the Hanover case.

Analysis of the 1919 Gross Premium Tax Law of Illinois

The material provisions of the 1919 law of Illinois are shown in Appendix III. By Section 6 thereof the statutory license year commenced on the first day of July of each year, and ended on the 30th day of June next thereafter. By Section 13 thereof, a foreign insurance company applying for admission into Illinois for the first time, was required, *before admission*, to pay a sum made certain by the formula prescribed. It could not be measured by gross premiums and be paid *before* the company was

admitted for the first time. It was measured at the rate of \$300.00 per annum for as many months as would elapse between the date of admission and the end of the statutory license year. Such payment was required for the license period commencing with the date of admission and ending at the expiration of the statutory license year. By Section 1 thereof, the annual $2\frac{1}{4}$ premium tax was measured on the gross amount of premiums received during the preceding calendar year. By Section 6 thereof said premium tax was due on the first day of July in each year, when the statutory license year commenced, and such payment was required for the statutory license year commencing on the first day of July in which it was due. Therefore, before a foreign company was first admitted into Illinois it paid a sum certain for the privilege of doing business during ~~the~~ fraction of the statutory license year following the issuance of the license. Before it renewed its license it was then for the first time required to pay a tax measured on premiums previously collected in the state, for the privilege of doing business during the statutory license year following the issuance of the renewal. In both instances the payment was exacted for the license period that followed the issuance of the license. The law did not measure the tax on business done after the issuance of the annual license, but required all payments exacted thereunder to be made before the issuance of the license. If the foreign corporation withdrew from Illinois at the end of any license year in which it was issued a license, it had previously paid for the privilege enjoyed and owed no tax under that law. The exaction under the 1919 law

of Illinois is technically a "license fee" or "admission fee", as distinguished from a "license tax." That distinction is very material in determining whether a tax law violates the Federal Constitution. The license or admission fee is exacted and paid before the foreign company is admitted into the State and, as stated in the Hanover case, *supra*, any inequalities as between foreign and domestic companies in that regard do not come within the inhibitions of the Fourteenth Amendment. But we will show that a "license tax" is exacted, applied, and paid after a foreign corporation has been admitted into the State and must conform to the equal protection clause of the Federal Constitution.

The United States Supreme Court in the Hanover case further said:

"The complainant insurance company complied with the requirements of section 22 and other unrepealed sections of the Act of 1869 and paid the 2 per cent tax on its premiums received as provided by the Act of 1919" (p. 504).

The requirements of Section 22 of the Act of 1869 referred to are hereinabove stated, as outlined in the opinion, and made it unlawful for a foreign insurance company to transact any business in the State of Illinois unless it had a prescribed amount of capital, appointed a service agent in the state, filed a copy of its charter, a statement of its financial condition, and a copy of its last annual report, and deposited certain securities with the State.

It is therefore made clear by the opinion that by a compliance with such conditions, precedent (Sec. 22 and the 1919 law), foreign insurance companies were received into the State of Illinois and put on a level with all other insurance companies of the same kind.

The Court further said in relation to the net receipts tax law of Illinois:

"It is plain that compliance with Section 30 is not a condition precedent to permission to do business in Illinois. The State Supreme Court concedes this,
* * *" (p. 512).

and then quotes from the decision of the State Court as follows:

"The fact that a tax is a privilege tax does not necessarily require that it be paid as a condition precedent to entering the state" (p. 512).

It was plain that compliance with Section 30 was not a condition precedent to permission to do business in Illinois, because it applied after the admission of foreign insurance companies into the State. The assessment and collection of the net receipts tax prescribed by said Section 30 followed the admission of foreign corporations into the State of Illinois and the enjoyment by them of the privilege of doing business therein. The amount of the tax required to be paid could not be determined or paid, according to the provisions of Section 30, until after the foreign corporation has been admitted into the State and had done business therein. In this regard, the Supreme

Court of Illinois said, as quoted by the United States Supreme Court:

"Compensation for that privilege should be based on the benefits actually derived from the business done under such privilege and such compensation must necessarily be assessed in some manner after the business is done and the benefits thereof received. Section 30 provides the method by which the amount of this compensation shall be determined and assessed" (p. 512).

It is obvious that both the Supreme Court of Illinois and the Supreme Court of the United States in the Hanover case properly conceived the elements involved in the requirements of the laws of Illinois constituting conditions precedent to entry into the State. They agreed on that question and their understanding in that regard is in accord with the general definition of the term "condition precedent."

*"At the common law, a condition is precedent when its fulfillment must precede the vesting of an estate or the accruing of a right. * * *" Webster's New International Dictionary, Second Edition, p. 556.*

- (D) *Tax laws that apply to foreign corporations after they are admitted into the State must conform to the equal protection clause of the Fourteenth Amendment.*

This Court in the Hanover case, having concluded that the net receipts tax under Section 30 there in question applied to foreign insurance companies after their admission into the State of Illinois and therefore did not

constitute a condition precedent to admission, was obliged to determine whether the tax discriminated against such companies. Many facts are stated in the opinion to demonstrate the discriminatory nature of the tax, which are immaterial to the consideration of the instant case. In the instant case the stipulation of facts (R. 20) and the findings of the trial court clearly reveal that the tax here in question is a heavy discrimination against foreign insurance companies in Oklahoma. However, on that phase of the case the following quotations from the Hanover case are important:

"In this class of cases, therefore, the question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations in engaging in business within the state" (p. 511).

"* * * the controlling test is to be found in the operation and effect of the law, as applied and enforced by the state" (p. 510).

"By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign within the state, and tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the 14th Amendment" (pp. 515-516).

- (E) *A foreign corporation licensed for one year at a time cannot be required to show past compliance with a tax law that violates the Federal Constitution, under the guise that the payment of the tax is a condition precedent to the renewal of its annual license.*

A means of circumventing the guaranties of the Federal Constitution would be employed in cases like the Hanover case and the one at bar, wherein the State issues licenses to foreign companies for only one year at a time, if the State were permitted to enforce under the guise of a condition precedent to the renewal of the license a discriminatory tax based on benefits actually derived from business done and which must necessarily be assessed in some manner after business is done. The State in so manipulating the tax would be making past compliance with a tax law which violates the Fourteenth Amendment a condition precedent to a renewal of the license. The guaranties of the Federal Constitution would thus be manipulated out of existence, as pointed out in the language of this Court in the case of *Marion L. Frost et al. v. Railroad Commission of the State of California*, 271 U. S. 583, (decided June 7, 1926, and cited in the Hanover case) where on pages 593-594 it was said:

“It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizens of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge

the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

The Supreme Court of Illinois in its decision reviewed by this Court in the Hanover case erroneously held that the foreign insurance company involved was required to pay the net receipts tax in order to maintain and retain its right to do business in the State and to obtain a new license for the following years. This presents the questions: What requirements may the State validly impose upon a foreign corporation as conditions subsequent to its admission into the State: Whether an unequal and discriminatory tax which applies to business done by a foreign insurance company after it receives its license to do business in the State may be employed to debar it from continuing in business within the State: Whether an unequal and discriminatory tax which applies to business done by a foreign insurance company after its admission into the State may be employed as a condition precedent to a renewal of the annual license?

Those questions are involved in the following analysis by the Supreme Court of the United States in the Hanover case:

"What, therefore, we have to decide here is whether the application of Section 30 can be one of the conditions upon which the insurance company is admitted to do business in Illinois, * * *. It is plain that compliance with Section 30 is not a condition precedent to permission to do business in Illinois. The State Supreme Court concedes this, but its reasoning that the payment of the tax under the section is a condition to its doing business in Illinois which may vary at the will of the state, without regard to taxes on similar domestic corporations is shown by the following passages: * * * However, the greatest financial benefit to such company flows from the continuation of the privilege to do business * * *" (p. 512).

Further passages from the decision of the Illinois Supreme Court relating to the provisions of the law of 1869 were quoted by the United States Supreme Court, including the following:

"It is evident, therefore, from the language of Section 22 quoted, that before appellant may continue in business in this state, its agent shall procure annually from the insurance superintendent of the state or his successor in law, a certificate showing that it has complied with the requirements of Section 30 with reference to this tax. Such certificate can not be lawfully issued without such showing. This act provides no other means of collecting such tax and no reference is made for its collection" (p. 513).

In this regard the United States Supreme Court proceeded by saying:

"The general principle upon which the Supreme Court of Illinois holds the tax complained of herein

to be valid is that the payment of it is part of the condition which the petitioner as a foreign insurance company is obliged to perform in order to maintain and retain its right to do business in the state. It was settled in [citing cases] that foreign corporations cannot do business in a state except by the consent of the state; that the state may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. But there is a *very important qualification* to this power of the state, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is that the state *may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the constitution of the United States may be infringed*. This is illustrated in respect to the breach of the commerce clause of the Constitution by the cases of [citing cases]. It is illustrated in cases in which a provision of a state law revoking the license of a foreign corporation for exercising its constitutional right to remove suits brought against them from the state courts to the federal courts has been held void [citing cases]; in cases in which the state has vainly attempted to subject foreign corporations to a payment of a tax which is a tax not only on the property of the corporation within the state but also on its property without the state, in violation of the due process clause of the 14th Amendment [citing cases]; and finally, in cases of a class to which it is contended the present case belongs, where a tax or license law operates to deny to the foreign corporation the equal protection of the laws" [citing cases] (pp. 507-508).

Whether the rules announced applied to foreign cor-

porations licensed for an indefinite period or from year to year the Court said:

"In the Greene case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens" (p. 509).

Continuing its analysis of the decision of the Supreme Court of Illinois, the United States Supreme Court said:

"The view of the Court seems to be that the constitutional necessity for equal application of the laws of the state to foreign and domestic corporations properly engaged in business is avoided if only the state provides that failure to comply with the laws during the period or at the end of the period for which the license runs justifies a revocation of the license pending the period, or a refusal to grant a new license for the following year. We do not think the state may thus relieve itself from granting the equal protection of its laws to a foreign company which has met the conditions precedent to its becoming a quasi domestic citizen. Of course at the end of the year for which the license has been granted, the State may in its discretion impose as condition precedent for a renewed license past compliance with its valid laws; but that does not enable the state to make past compliance with Section 30 a condition precedent to a renewal of the license, if as we find that section violates the 14th Amendment, for, as already said, while a state may forbid a foreign corporation to do business within its jurisdiction, or to continue, it may not do so by imposing on a corporation a sacrifice of its constitutional rights. * * * The state in dealing with foreign corporations may properly and without discrimina-

tion as between them and domestic companies regulate the former by a provision that for a failure by them to comply with any valid law governing the conduct of their business in the state the license already granted may be revoked. That is a legitimate condition in the treatment of foreign companies which do not have property and home within the state. It is a police regulation. But the power thus to revoke a license for breach of a law can only be validly exercised if the law be a constitutional one" (pp. 514-515).

II

The gross premium tax law of Oklahoma applies after issuance of each annual license. Since it is exacted for the privilege already exercised, its payment cannot be required as a valid condition precedent to the annual license renewal.

We shall show that the gross premium tax law of Oklahoma in question imposes a tax that in the light of the equal protection clause of the Federal Constitution is the same as the unconstitutional net receipts tax of Illinois in question in the Hanover case.

(A) *Provisions of Constitution and Statutes of Oklahoma affecting determination of issue herein.*

Section 1, Article XIX, of the Constitution of Oklahoma, provides:

"1. Foreign Insurance Companies—Conditions of Doing Business.

"No foreign insurance company shall be granted a license or permitted to do business in this State until it shall have complied with the laws of the State, including the deposit of such collateral or indemnity

for the protection of its patrons within this State as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license."

We have shown under our Proposition I (E) (*ante*) and the Hanover case reveals that the State cannot

" * * * thus relieve itself from granting the equal protection of its laws to a foreign company which has met the conditions precedent to its becoming a *quasi domestic citizen* * * *" (p. 514).

" * * * the state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed" (p. 507).

Therefore, said constitutional provision violates the Federal Constitution insofar as it requires a foreign insurance corporation, before it is admitted into the state, to agree to comply with tax laws that deny to it the equal protection of the laws.

Section 2, Article XIX, of the Constitution of Oklahoma provides:

"Entrance Fees—Annual Tax.

"Until otherwise provided by law, all foreign insurance companies, including surety and bond companies, doing business in the State, except fraternal insurance companies, shall pay to the Insurance Commissioner for the use of the State, an entrance fee as follows:

"Each foreign Life Insurance Company, per annum, two hundred dollars; each Foreign Fire Insurance Company, per annum, one hundred dollars; each Foreign Accident and Health Insurance Company, jointly, per annum, one hundred dollars; each Surety and Bond Company, per annum, one hundred and fifty dollars; each Plate Glass Insurance Company (not accident), per annum, twenty-five dollars; each foreign live stock insurance company, per annum, twenty-five dollars.

"Until otherwise provided by law, domestic companies excepted, each insurance company, including surety and bond companies, doing business in this State, shall pay an annual tax of two per centum on all premiums collected in the State, after all cancellations are deducted, and a tax of three dollars on each local agent."

The first two paragraphs of Section 2, Article XIX, of the Constitution (*supra*) require foreign insurance companies to pay the entrance fees therein prescribed. The title "Entrance Fees" refers to those paragraphs. By the last paragraph of the section the premium tax is imposed and the title "Annual Tax" refers to that paragraph, which in context stands alone to the same extent as though it were embodied in a separate section. In grammatical construction it is in no manner dependent upon or related to the preceding two paragraphs dealing with the entrance fee. In fact, its requirements could not operate or apply until after the foreign insurance company had paid the entrance fee provided by the preceding paragraphs, received its license, and carried on its business. Insurance premiums against which the tax paragraph applies could

not conceivably be collected in the State until after the foreign insurance company had received its license to do business.

This observation corresponds with the statute of Oklahoma that originally imposed the 2% gross premium tax and the present statute that increased the rate to 4% (see Sec. 22, Appendix I, and Appendix II). Those statutes do not refer to the premium tax imposed by the Constitution as within the entrance fee paragraphs. Instead, the statutes require foreign corporations to "pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of 2% (now 4%) on all premiums collected in this State."

In order to employ "premiums collected in the State" as a measure for an annual "entrance fee," "license fee," or "condition precedent" to admission instead of "an annual tax of 2% (now 4%) on all premiums collected in this State" as expressly stated in the Constitution and statutes, it would have been necessary to exempt foreign insurance companies from gross premium taxation upon their first year's business, as was done in the 1919 gross premium tax law of Illinois. It would have been necessary to admit them for one license year in order for them to do business and collect the premiums upon which to measure the entrance or license fee for the following year. In such event nothing would have been owing under the law by the foreign corporation if at the end of the first year it did not desire to renew its license and withdrew from the State. Such has never been the interpretation of the gross

premium tax laws of Oklahoma or the uniform administrative practice thereunder. (See quotation from opinion of Circuit Court of Appeals, *ante*; R. 40-41; stipulation of facts, R. 20-22.) The Legislature could not have so intended in the face of the express language employed in the statute. Had the Legislature so intended it would have been very simple to make provision therefor as did the 1919 gross premium tax law of Illinois (Appendix III).

In regard to how the tax applies in relation to when the foreign corporation is admitted, the Kansas Supreme Court has held in a recent decision (1940) in *Pacific Mut. Life Ins. Co. v. Hobbs*, 103 Pac. (2d) 854:

"The statute requiring foreign insurance companies at the time of making annual statements required by law, to pay taxes on the gross amount of premiums received by them for business done in the state during the preceding year, imposes taxes, payable at the end of the year, for the privilege of doing business in the state. Gen. St. 1935, 40-252.

"The tax on gross premiums received by foreign insurance companies for business done in the state is an 'excise tax' in the nature of a franchise or privilege tax on the privilege of doing business, and partakes of the nature of a license tax in the sense that payment thereof is required as a condition precedent to the renewal of certificates of authority of such companies.' Gen. St. 1935, 40-252."

In the opinion the Court pointed out that otherwise:

"* * * a foreign company coming into the state would be exempt from taxation upon the business done in the first year, if it withdrew at the end of the

first year. It is not to be presumed the legislature intended to exempt a foreign insurance company from taxation upon its first year's business."

That case is important in the consideration of the present question only to the extent of showing that such taxes apply *after admission* and are paid *after* the privilege is exercised. The question whether the tax there considered violated the equal protection clause of the Federal Constitution was not involved in that case. In this regard the Supreme Court of Illinois said with reference to the net receipts tax in question in the Hanover case, as quoted in the opinion of the Hanover case at page 512;

"Compensation for that privilege should be based on the benefits actually derived from the business done under such privilege and such compensation must necessarily be assessed in some manner after the business is done and the benefits thereof received. Section 30 provides the method by which the amount of this compensation shall be determined and assessed."

The material sections of the Oklahoma General Insurance Act of 1909 are shown in Appendix I. The Oklahoma 4% gross premium tax law of 1941 here in question is shown as Appendix II. It may be observed therefrom that the tax law here in question originated as Section 22 of the General Insurance Act of 1909 (Appendix I). The terms and provisions of the original law have remained the same in all material respects, except that effective April 25, 1941, the rate of the tax was increased from 2% to 4%. In the Hanover case the increase in the rate of the

tax resulted from a decision of the Supreme Court characterizing the net receipts tax law there in question as a privilege tax (see Proposition I [A]).

Similar to the Act of 1869 of the State of Illinois, of which Section 30, the net receipts tax in question in the Hanover case, was a part, the Oklahoma General Insurance Act of 1909, of which the gross premium tax law in question here was a part, before admitting foreign insurance companies into Oklahoma, required by Section 11 that the Insurance Commissioner be satisfied that the company is qualified under the laws of the State to transact business. Section 18, entitled "Condition of Admission to do Business," provides:

"No foreign insurance company shall be admitted and authorized to do business in this state until: * * *

First: It files a copy of its charter and a statement of its financial condition.

Second: It shall satisfy the Insurance Commissioner that it is legally organized under the laws of its State to do the business it proposes to transact in Oklahoma. If a life insurance company, that it has on deposit with the proper officer securities in a prescribed amount and type.

Third: If other than a surety or bond company, it is required to have a paid-up capital or guaranty capital or surplus in a prescribed amount.

Fourth: It shall appoint the Insurance Commissioner its service agent.

Section 21 requires the Insurance Commissioner to

issue to foreign insurance companies a license or certificate of authority, if he finds that the facts warrant and that all laws applicable to said company are fully complied with.

Similar to the requirements of the Act of 1869 of the State of Illinois, set forth in the Hanover case (see Proposition I [B], the Oklahoma General Insurance Act of 1909 Appendix I) further requires by Section 21, annual certificates or licenses to foreign insurance companies, which expire on the last day of February in each year. It requires by Section 21 that such companies make annual reports of their condition and affairs. Section 13 gives the Insurance Commissioner authority to investigate the affairs of such companies and if unsound, Section 15 gives the Insurance Commissioner authority to revoke or suspend the license and close up the business. Section 26 subjects any one violating the Act to a penalty not exceeding \$500.00.

(B) *Oklahoma decision construing the Oklahoma gross premium tax law.*

(The New York Life Insurance Company Case)

The case of *New York Life Ins. Co. v. Board of Co. Com'rs*, 155 Okla. 247, 9 Pac. (2d) 936, involved the question of whether or not the payment of the gross premium tax under the tax law here in question was in lieu of ad valorem taxes on the foreign insurance company's property. The Court in the opinion recited the provisions of Sections 1 and 2, Article XIX, of the Constitution hereinabove quoted, and the provisions of the tax law here in question (Appendix II), and said:

"A tax on gross premiums of insurance is a tax upon the receipts of money or its representative in notes and bills, and not on property or any article of commerce; it touches only a fund in the treasury of the company. * * * A tax law imposing a percentage on premiums of a foreign insurance company is a tax on the business. * * *

* * * It seems manifest that a certain per cent of the premiums collected by a foreign insurance company is an equitable mode of determining what burdens, license fee or privilege tax should be charged to said corporation for the right or privilege to do business within the state. * * * The state has the power to impose these conditions, which are subject to no constitutional limitation or inhibition, except that such taxes and fees 'shall be uniform upon the same class or subjects' and shall not be in conflict with the Federal Constitution."

The Oklahoma Court therefore characterized the tax law in question as a tax "on the business" "for the right or privilege to do business within the State," which is the same character as was placed on the invalid net receipts tax of Illinois in question in the Hanover case. However, as we have shown under Proposition 1 (A) (*ante*), the question whether the tax, whatever its character may be, violates the Federal Constitution depends upon its effect as applied and enforced.

The Oklahoma Court recognized the principles announced in the Hanover case, as appears from the language "such taxes and fees 'shall be uniform upon the same class or subjects' and shall not be in conflict with

the Federal Constitution." However, the Court did not decide the question whether the gross premium tax violated the Federal Constitution, as that question was not involved.

Furthermore, the 2% insurance premium tax law was in force at the time that case was decided. Had the question been presented in that case as to whether the 2% tax violated the equal protection clause of the Federal Constitution and had the Court decided that it did not, it would not follow that the 4% tax here in question is valid. Whether foreign and domestic insurance corporations share fairly equivalent tax burdens is the question that must be determined in any case where the tax questioned applies *after admission* of the foreign corporation into the State. The rate of the tax at the time of such determination is a vital element.

(C) *Illustration of uniform administrative practice and construction in Oklahoma according to findings of Circuit Court of Appeals.*

The findings of the Circuit Court of Appeals regarding the uniform administrative practice of the Insurance Commissioner (R. 40-41) correctly establish such practice. Such practice is consistent with the requirements of the pertinent constitutional provisions (*ante*) and the statutory requirements of Oklahoma (Appendices I and II).

In order to clearly illustrate the uniform administrative practice in Oklahoma and demonstrate how the tax law in question operates we shall quote the findings of

said Court at pages 40 and 41 of the record and parenthetically apply the same to specific years, to-wit:

"It has been the uniform administrative practice of the Insurance Commissioner, since the effective date of the 1909 General Insurance Act of Oklahoma (Appendix I), when a foreign insurance company desires for the first time to do business in Oklahoma (commencing on the first day of August, 1942, for illustration), to require it, among other things, to file an application for a license to expire on the last day of February next after its issue (the 28th day of February, 1943, would be the expiration date of the license under above illustration), and, on or before such date (the 28th day of February, 1943), to pay the gross premium tax imposed by law on all premiums, less proper deductions, received by it in Oklahoma from the date of issue of its license (the first day of August, 1942,) to and including the 31st day of December next (the 31st day of December, 1942); and when a foreign insurance company holding a license to do business in Oklahoma during any license year desires to do business therein during the ensuing license year (commencing on the first day of March, 1943, and expiring on the 29th day of February, 1944), to require it, among other things, (a) to file, on or before the last day of February of the current license year (the 28th day of February, 1943), an application for a license for the ensuing year (commencing on the first day of March, 1943, and expiring on the 29th day of February, 1944, inclusive), (b) to pay the gross premiums tax on all premiums, less proper deductions, received by it in Oklahoma during the preceding calendar year (calendar year ending the 31st day of December, 1942), as a condition precedent to the issuance of the license for the ensuing year (commencing on the first day of March, 1943, and expiring on the 29th day of February, 1944), and (c) to pay,

on or before the last day of February of the ensuing license year (the 29th day of February, 1944), the gross premium tax on all premiums, less proper deductions, received by it in Oklahoma during the preceding calendar year (calendar year ending the 31st day of December, 1943);"

The opinion then proceeds (R. 41) to correctly show that the Insurance Commissioner

"* * * in issuing renewal licenses has uniformly construed it (the tax law in question) as requiring the payment, on or before the last day of February in each year, of the gross premiums tax for the right or privilege of entering Oklahoma and doing business therein during the license year expiring on that date."

That construction shows that if a renewal license is issued for the license year commencing March 1st, 1943, then on or before the 29th day of February, 1944, when such renewal license expires, the licensee is required to pay the tax for the right or privilege of having entered Oklahoma on the first day of March, 1943, and doing business therein during the license year expiring on the 29th day of February, 1944. This is borne out by the conclusion of the Court on page 46 of the record.

(D) *Illustration of operation of the 1919 Illinois gross premium tax law involved in the Hanover case.*

Reference is made to our discussion under Propositions I (B) and (C), *ante*, regarding the distinction between the 1919 Illinois gross premium tax law and the Oklahoma gross premium tax law in question. Supple-

menting that discussion and our illustration of the operation of the Oklahoma law, we feel that an illustration of the operation of the Illinois law will assist the Court in making the comparison. The material portions of the Illinois law are shown in Appendix III.

Under said Illinois law licenses to foreign insurance companies were issued for one year at a time. The license year commenced on the first day of July and expired on the 30th day of June next thereafter (Sec. 6).

Applying the provisions of said law to specific years to illustrate and show that it applies as a condition precedent to the issuance of the license each year, we find:

(a) Assume for the purpose of illustration that a foreign insurance company was admitted to do business in Illinois for the first time on August 1, 1921. Before it received its license and was admitted to do business in Illinois it was required to pay \$275.00 (figured at the rate of \$300.00 per annum for the number of months elapsing between August 1, 1921, and July 1, 1922—see Sec. 13). It was required to pay said tax before it was so admitted, and for the privilege of doing an insurance business in Illinois during the period following such payment and beginning August 1, 1921, the date of admission to do business in Illinois, and ending June 30, 1922, thereafter (see Sec. 6).

(b) Assume for the purpose of illustration that it desired to renew its license. Before it received a renewal of its license for the ensuing license year commencing on July 1, 1922 (Secs. 6 and 9), it was required to pay a tax

of 2% on the gross amount of premiums which it has received in Illinois during the calendar year 1921 (Sec. 1). It was required to pay said tax for the privilege of doing an insurance business in Illinois during the period following such payment, being the next ensuing license year beginning July 1, 1922 (Secs. 6 and 9).

(c) If at the end of the license year under either illustration (a) or (b), it did not desire to renew its license and be readmitted to do business in Illinois for the next ensuing license year, it owed no tax under the 1919 law for the privilege that it had enjoyed of doing business in Illinois, for it had paid for that privilege before it received its license to do business.

The 1919 Insurance Premium Tax Law of Illinois and the 1941 Insurance Premium Tax Law of Oklahoma Distinguished

It should readily be observed that the 1919 insurance premium tax law of Illinois and the 4% insurance premium tax law of Oklahoma are radically different in type, character, and manner of application. The Oklahoma 4% insurance premium tax law applies each year after the issuance of the license to the foreign insurance company. The determination and collection of the tax each year follows the issuance of the license. The determination and collection of the tax follows the enjoyment by the licensee of the privilege of doing business. The amount of the tax required to be paid cannot be determined or paid until after such companies do business in the State. When a foreign insurance company withdraws from the State of

Oklahoma at the end of its first license year or at the end of any current license year under a renewal license, it must nevertheless pay the tax that is determined and becomes due at the end of said current license year. It is plain, therefore, that said 4% tax on insurance premiums collected in the State of Oklahoma is not and cannot possibly be a condition precedent to the permission granted to foreign insurance companies to do business in Oklahoma.

The 1919 insurance premium tax law of Illinois applies before the admission of foreign insurance companies into the State of Illinois. The determination and collection of that tax precede each year the issuance of the license to the foreign insurance company and the enjoyment by it of the privilege for which the tax is paid. The tax must be paid before such company receives its license. The tax is paid for the future and for the privilege to be enjoyed during the license year following the payment thereof. When a foreign insurance company withdraws from the State of Illinois at the end of any current license year it owes no tax under said 1919 law, since it had before it received its license paid for the privilege enjoyed. It is plain, therefore, why said 1919 insurance premium tax law of Illinois was in the Hanover case treated and considered without question as a valid condition precedent to the admission of foreign insurance companies to do business in Illinois.

The 1919 insurance premium tax law of Illinois applied and operated as an entrance or license fee, before admission. Its arbitrary character was therefore immaterial. The 1941 insurance premium tax law of Oklahoma

applies and operates as an excise or business tax, after admission. Its arbitrary character is therefore very material.

(E) *Analysis of opinion of the Circuit Court of Appeals.*

The opinion correctly shows that each certificate or license issued to petitioner for the years 1922 to 1942, inclusive, by its terms expired on the last day of February next after its issue (R. 39).

It correctly shows that under Section 1, Article XIX, of the Oklahoma Constitution, a foreign insurance company cannot be admitted into Oklahoma until it agrees to pay all taxes and fees at any time imposed by the State under penalty of forfeiture of its license (R. 39). But the Hanover case, as we have shown under our Propositions I(E) and II(A), *ante*, holds that a State cannot in that manner relieve itself from granting the equal protection of the laws; that the State cannot exact as a condition of the corporation's engaging in business within its limits that its rights secured by the Constitution of the United States may be infringed. Therefore, that provision of the Oklahoma Constitution does not validate the gross premium tax law in question, which imposes a discriminatory tax applying to business done after the foreign insurance corporation has received its license and which is paid after the privilege granted by such license has been enjoyed.

It correctly shows that under Section 2, Article XIX, of the Oklahoma Constitution foreign life insurance companies are required to pay an annual entrance fee of

\$200.00 and an annual percentage tax on premiums collected in the State until otherwise provided by law (R. 39).

It correctly shows that the tax of 2% on all premiums collected in the State imposed by Section 22 of the Oklahoma General Insurance Act of 1909 was carried forward in Section 10478, Okla. Stat. 1931; that the 1941 amendment of that statute became effective April 25, 1941, and increased the rate of the tax from 2% to 4% (R. 40). This is revealed by Section 22 of Appendix I and Appendix II hereto attached.

It correctly reveals that Section 21 of the General Insurance Act of 1909 is carried forward in the present statutes of Oklahoma, and requires insurance companies to file on or before the last day of February in each year a statement of their financial condition and business of the preceding calendar year, and provides that the Insurance Commissioner shall issue licenses expiring on the last day of February next after their issuance to such companies that have complied with the laws of Oklahoma (R. 40). That section is shown as Section 21 in Appendix I hereto attached.

The opinion does not recite the provisions of Section 18 of the General Insurance Act of 1909, which outlines the conditions of admission to do business in Oklahoma. That section is also carried forward in the present statutes of Oklahoma. It is shown as Section 18 in Appendix I hereto attached, and we have hereinabove outlined its provisions under subdivision (A) of our Proposition II.

It correctly reveals the uniform administrative practice and construction in Oklahoma (R. 40-41). We have hereinabove under subsection (C) of our Proposition II quoted and illustrated the Court's findings in that regard.

The opinion correctly shows (R. 42): "It is not an essential of a privilege tax that it be paid before the exercise of the privilege." We readily admit that the law in question imposes a privilege tax and that the State may require it to be paid after the privilege is exercised, provided that it does not discriminate against foreign insurance companies in favor of similar domestic companies. We have shown under our Proposition I (A) that when the question presented is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the form or character of the tax, whether it be a privilege, occupation, excise, or property tax, is immaterial. But that according to the Hanover case "the controlling test is to be found in the operation and effect of the law as applied and enforced by the State" and "the question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations in engaging in business within the State." Although privilege taxes may be required to be paid before or after the privilege is enjoyed, the 4% privilege tax here in question is paid after the privilege is enjoyed. That fact is material here only in that it clearly shows that the law operates and applies after the license is issued to the foreign insurance corporation.

The opinion (R. 41) correctly holds that foreign insur-

ance companies in Oklahoma are licensed for one year at a time. But we have shown under subsection (E) of our Proposition I that whether the license is indefinite or must be renewed from year to year, "the principle is the same that pending the period of business permitted by the State, the State must not enforce against its licensees unconstitutional burdens."

The holding (R. 41) that no gross premiums tax is exacted from domestic insurance companies in Oklahoma pertains to the discriminatory nature of the tax, about which there is no question.

The opinion (R. 43) cites the decision of the Supreme Court of Oklahoma which we have discussed under our Proposition II(B).

The opinion (R. 44-46) deals at some length with the Hanover case in an attempt to distinguish it from the instant case. It shows that the 1919—2% gross premium tax law of Illinois imposed a tax on non-resident insurance companies for the privilege of doing business in Illinois (R. 44); that the license for which the tax under said law was paid put foreign corporations upon a level with like domestic insurance companies (R. 46). It shows that the net receipts tax in question in the Hanover case was not a condition precedent to permission to do business in Illinois and, being a heavy discrimination in favor of domestic companies, violated the Federal Constitution. The opinion concludes the discussion of the Hanover case in these words:

"In that case, the State, having exacted a gross

premiums tax for the privilege of doing business in the State, undertook to impose, in addition thereto, an unconstitutional tax" (R. 46).

It is obvious that the Circuit Court of Appeals was misled in its consideration of the Hanover case by the 1919 law of Illinois incidentally involved in that case. It observed that the 1919 law of Illinois was a gross premiums tax law imposing a tax for the privilege of doing business in the State, and that its validity as a condition precedent to admission was not questioned in the Hanover case. However, the Circuit Court of Appeals failed to regard the substance of the 1919 Illinois law and its effect as applied by the State of Illinois. The Court does not discuss the terms of that law or in any manner compare its operation with the Oklahoma gross premium tax law in question. The 1919 gross premiums tax law of Illinois was not in question in the Hanover case and its terms were not set forth in the opinion. It was properly considered as a condition precedent to admission and the opinion in that case makes only a brief reference thereto. The Oklahoma gross premium tax law in question here and the 1919 Illinois gross premium tax law incidentally involved in the Hanover case are radically different in operation and effect, as shown under our Propositions I(B) and (C) and II (E).

We quote from the opinion (R. 43-44):

"The Insurance Company's license which was issued in 1940 expired February 28, 1941. March 1, 1941; to February 28, 1942, constituted a new license

year and a new admission into the state. It was within the power of the state to change the conditions of admission at any time as to future license years and the Insurance Company was not entitled to a license for a license year beginning after the effective date of the amendment increasing the gross premiums tax, without paying such increased tax for that year."

The authorities followed by the Circuit Court of Appeals on this phase of its opinion will be considered under our Proposition III.

Then the opinion concludes by holding (R. 46):

"In the instant case, the state exacts the payment on or before the twenty-eighth day of February in each year (in leap years the 29th day of February) of a valid privilege tax based on gross premiums for the privilege of doing business in Oklahoma during the license year expiring on that date and the payment of such valid tax as a condition precedent to the issuance of a license for the ensuing license year. The Supreme Court recognized in the Hanover Insurance Company Case that 'at the end of the year for which the license has been granted, the State may in its discretion impose, as conditions precedent for a renewed license, past compliance with its valid laws.'"

The increase in the rate of the tax from 2% to 4% became effective April 25, 1941, and according to the first paragraph above quoted from the decision of the Circuit Court of Appeals, the petitioner was not entitled to a license for the license year beginning March 1, 1942, without paying the 4% tax for that year. But the 4% tax in

question is not in fact paid before admission and for the future. That is borne out by the concluding portion of the decision above quoted, which may be illustrated as follows:

The payment of the 4% tax on or before the 28th day of February, 1942, was exacted for the privilege of doing business during the license year expiring on the 28th day of February, 1942, and as a condition precedent to the issuance of a license for the license year beginning March 1, 1942. By paying said 4% tax on or before February 28, 1942, the petitioner was entitled to receive a license for the license year beginning March 1, 1942, and expiring February 28, 1943. Then the State exacts the payment on or before the 28th day of February, 1943, of the 4% tax for the privilege of doing business in Oklahoma during the license year expiring on that date, *viz.*: The 28th day of February, 1943, and the payment of such tax as a condition precedent to the issuance of a license for the license year beginning March 1, 1943. If petitioner did not desire to do business in the State for the license year beginning March 1, 1943, and withdrew from the State on February 28, 1943, when its license expired, it would nevertheless be required to pay the tax for the privilege that it had enjoyed during the license year expiring at the time of its withdrawal.

The decision clearly and correctly shows that the 4% tax is exacted at the end of the license year for the privilege previously enjoyed. Such being the case the exaction is invalid either as a tax or as a condition precedent in the event of a renewal of the license for the ensuing year.

III

The gross premium tax of Oklahoma imposes a discriminatory tax, and the constitutional necessity for equal protection of the laws cannot be avoided under the guise that payment of such tax is a condition precedent to the issuance of renewal licenses.

The gross premium tax law of Oklahoma in question possesses the same character and constitutional defects as the invalid net receipts tax law of Illinois in question in the Hanover case.

The discriminatory nature of the Oklahoma tax is obvious. The Hanover case makes it clear that if the said discriminatory tax law applies after the foreign company is issued a license to do business in the State, such company could not be debarred from continuing to do business in Oklahoma upon a failure or refusal to pay the tax, nor could a compliance with said tax law be required as a condition precedent to a renewal of the company's annual license.

Therefore, the decisive question in the instant case is whether the tax law in question, under its express terms and provisions, the uniform administrative practice and interpretation in Oklahoma, and the decision of the Circuit Court of Appeals constitutes one of the valid conditions precedent to the issuance of original or renewal licenses to foreign insurance companies.

Under our Proposition II (E) we have quoted the pertinent paragraphs from the decision of the Circuit Court

of Appeals. It is obviously the view of that Court that the constitutional necessity for equal protection of the laws is avoided under the Oklahoma gross premium tax law in question by following the theory that failure to pay the tax that is exacted at the end of the annual period for which the license runs justifies a refusal to grant a renewal license for the following license year. In support thereof the Court cites:

—*Philadelphia Fire Association v. New York*, 119 U. S. 110, 119;

Manchester Fire Ins. Co. v. Herriott, C. C. Ia., 91 Fed. 711, 717-720;

British-American Mortg. Co. v. Jones, 77 S. C. 443, 58 S. E. 417, 420 (R. 44).

That theory of dealing with tax laws applicable to foreign corporations that are licensed for one year at a time permits circumvention, manipulation, and disguise through which the guaranties of the Fourteenth Amendment are avoided. If it may be said that this Court in the Philadelphia Fire Association case adopted any such theory, it has refused to adhere thereto in later cases, as may be observed from its opinion in the Hanover case. We shall now discuss each of the cases cited by the Circuit Court of Appeals on this phase of its opinion and the effect of such cases in the light of later decisions of this Court.

(A) *Discussion of cases cited by the Circuit Court of Appeals in support of its theory.*

(The Philadelphia Fire Association Case)

The case of *Fire Association of Philadelphia v. New York* (1886), 119 U. S. 110, which was cited by the Circuit Court of Appeals (R. 44), involved a retaliatory law of New York. The law was enacted in 1865 and as amended in 1875 provided that whenever the laws of other states should require any payment of New York corporations for taxes, license fees, etc., greater than required from similar companies of other states by the laws of New York, then all companies of such states doing business in New York should pay to New York an equal amount for such taxes, license fees, etc.

Pennsylvania, by an act passed April 4, 1873, prohibited a foreign insurance company from doing business in Pennsylvania until it was granted a certificate of authority. It required such corporations that were authorized to transact business in Pennsylvania to report in January of each year the premiums received by such companies during the preceding calendar year and to pay a percentage tax thereon. It further provided:

“ * * * and the Commissioner shall not have power to grant a renewal of the certificate or said company or association until the tax aforesaid is paid into the state treasury.”

The defendant Pennsylvania insurance company received a certificate of authority to do business in New York

in 1872 and from year to year thereafter until 1882. In the year 1881 the Pennsylvania company received in the State of New York premiums in an amount specified. The State of New York brought an action against the Pennsylvania company to recover the percentage tax on the premiums received by the Pennsylvania company during 1881. The State of New York contended that the Pennsylvania company should pay as a tax for the year 1881 the amount claimed. The Pennsylvania company claimed the benefit of the Fourteenth Amendment and contended that being in the State of New York by permission continuously from 1872 to 1882, the State of New York imposed on it while there in 1882 an unequal and unlawful burden. Neither contention was sustained. The Court in the opinion said:

"This Pennsylvania Corporation came into the State of New York to do business, by the consent of the State, under this Act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the State for any given year under such license, and subject to the conditions prescribed by statute. The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given. * * * It could not be of right within such jurisdiction, until it should receive the consent of the State to its entrance therein under the

new provisions; and such consent could not be given until the tax, as a license fee for the future, should be paid."

The Fourteenth Amendment to the Constitution of the United States went into effect in July, 1868, only eighteen years before that case was decided. The Court relied primarily upon the earlier decisions in the cases of *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, and *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972.

The case of *Paul v. Virginia* was decided November 1, 1869, approximately sixteen months after the Fourteenth Amendment became effective. *Ducat v. Chicago* was decided January 9, 1871, approximately two and one-half years after the Fourteenth Amendment became effective. *Paul v. Virginia* did not involve the Fourteenth Amendment, but involved the privilege and immunities clause of Section 2, Article IV, and the commerce clause of Section 8, Article I, of the Constitution. *Ducat v. Chicago*, as said in *Southern Ry. Co. v. Greene*, 216 U. S. 400:

* * * * arose before the Fourteenth Amendment had become part of the Federal Constitution, and that no reference is made in the opinion of the court to the Fourteenth Amendment, although the case was decided after that amendment went into effect."

Mr. Justice Harlan filed a strong dissenting opinion in the *Fire Association of Philadelphia* case in which he discussed *Paul v. Virginia* and *Ducat v. Chicago* but pointed out that the right of the states to admit foreign corporations upon such terms and conditions as they may

think proper to impose is subject to the important qualification that was announced in the earlier case of *Lafayette Insurance Company v. French*, 18 How. 407, 15 L. ed. 453, *viz*: provided the terms and conditions so prescribed are not repugnant to the Constitution of the United States. That qualification, as pointed out in the dissenting opinion, had been applied in *Insurance Company v. Morse*, 20 Wall. 445, 22 L. ed. 365, to invalidate a statute of Wisconsin whereby foreign corporations before admission into the state were required to agree that suits brought against them in the state courts would not be removed to the Federal Courts. The dissenting opinion further pointed out that in the light of the guarantees of the Federal Constitution there existed no difference between the invalid Wisconsin statute involved in the *Insurance Company v. Morse* case and the New York statute involved in *Fire Association of Philadelphia v. New York*.

(The Manchester Fire Insurance Company Case)

The case of *Manchester Fire Ins. Co. v. Herriott* (1899), 91 Fed. 711 (Circuit Court, S. D. Iowa), which was cited by the Circuit Court of Appeals, was decided long before the decision in the Hanover case and follows *Paul v. Virginia* and *Ducat v. Chicago, supra*.

(British-American Mortgage Company Case)

The case of *British-American Mortgage Co. v. Jones* (1907), 77 S. C. 443, 58 S. E. 417 (Supreme Court of South

Carolina), which was cited by the Circuit Court of Appeals, was likewise decided long before the Hanover case and follows the Philadelphia Fire Association case.

(B) *The theory adopted by the Circuit Court of Appeals is repugnant to the principles announced in the Hanover case.*

(The Greene Case)

In *Southern Railway Co. v. Greene*, 216 U. S. 400 (1910), this Court held, quoting from the syllabus:

"A foreign railway corporation which has come into the state in compliance with its laws, and has therein acquired property of a fixed and permanent nature, upon which it has paid all taxes levied by the state, is a person within the jurisdiction of the state, and, as such, is protected by the equal protection of the laws clause of U. S. Const., 14th Amend., against the imposition, under 1 Ala. Code. 1907., secs.. 2391-2400, of an additional franchise tax for the privilege of doing business within the state, where no such tax is imposed upon domestic corporations carrying on a precisely similar business."

In the opinion the Court discussed the case of *Ducat v. Chicago*, *supra*, and showed that it arose before the Fourteenth Amendment became effective. It also discussed and quoted from *Fire Association of Philadelphia v. New York*, *supra*, and then said:

"We have adverted to these cases with a view of showing that the precise point involved herein is not concluded by any of them. It would not be frank to

say that there is not much said in the opinions in those cases which justifies the argument that the power of the state to exclude a foreign corporation, not engaged in interstate commerce, authorizes the imposition of special and peculiar taxation upon such corporations as a condition of doing business within the state. But none of the cases relied upon presents the question under the conditions obtaining in the case at bar. We have here a foreign corporation within a state, in compliance with the laws of the state, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method, not employed as to domestic corporations of the same kind, carrying on a precisely similar business."

(The Hanover Case)

In 1926, and sixteen years after this Court had found that the Greene case was not governed by *Ducat v. Chicago, supra*, and *Fire Association of Philadelphia v. New York, supra*, it again was asked to apply those decisions in the Hanover case. The Hanover case was decided some 58 years after the Fourteenth Amendment went into effect, and the Court was mindful of the means employed to circumvent the guaranties for equal protection of the laws as to foreign corporations licensed for one year at a time.

The defendant in error in the Hanover case cited and relied upon *Paul v. Virginia*, *Ducat v. Chicago* and *Fire Association of Philadelphia v. New York* (see p. 375 of 71 L. ed.). The unanimous opinion in the Hanover case on page 507 of 272 U. S. expressly referred to *Paul v. Virginia* and *Ducat v. Chicago* among other cases to the same

effect. It pointed out that by later decisions there had been established an important qualification to the rule announced by the former decisions, in that the state may not exact as a condition of foreign corporations engaging in business within its limits, that the rights secured to such corporations by the constitution of the United States may be infringed. That qualification according to the opinion in the Hanover case had been applied to different classes of cases as described in the opinion, and the Court then proceeded to apply it in the Hanover case where a tax or license law operated to deny to foreign corporations licensed for one year at a time the equal protection of the laws.

The opinion in the Hanover case on page 509 of 272 U. S. points out that in the Greene case the license was indefinite and in the Hanover case had to be renewed from year to year, but the principle is the same that during the period of business permitted by the State, the State must not enforce against its licensees unconstitutional burdens. On page 514 of the opinion the Court, in discussing the decision of the Supreme Court of Illinois, points out that it seemed to be the view of that Court that the constitutional necessity for equal protection of the laws is avoided if the State provides that failure to comply with the law at the end of the period for which the license runs justifies a refusal to grant a new license for the following year. The Court then proceeds on pages 514 and 515 of the opinion to discuss and follow the principles announced in the Greene case and other cases cited, and to show that where foreign corporations are licensed for only one year

at a time a tax cannot be manipulated outside the guarantees of the Fourteenth Amendment by disguising the tax as a condition precedent to renewals of the annual license.

The practice of the Insurance Commissioner of Oklahoma, in requiring the payment of the gross premium tax in question, that becomes due at the end of each current license year, for the privilege exercised therein, as a condition precedent to the issuance of renewal licenses, is merely an attempt to avoid the constitutional necessity for equal protection of the laws. The attempt thus to avoid the constitutional guarantees of the Fourteenth Amendment is just as clear in the instant case as it was in the Hanover case. It was not permitted in the Hanover case and should not be permitted in the instant case.

(The Shaffer Oil & Refining Company Case)

In *Sneed v. Shaffer Oil & Refg. Co.*, (C.C.A. 8th), 35 Fed. (2d) 21 (1929), the Court had under consideration the Oklahoma statute enacted in 1927, which imposed a license fee upon domestic corporations of 50c for each \$1,000.00 or its authorized capital stock, or less, and a license fee upon foreign corporations of \$1.00 for each \$1,000.00 of its capital invested in its business in Oklahoma. The opinion points out that both domestic and foreign corporations were by Section 9947, Comp. Stat. of Okla. 1921, required to procure a license for one year at a time and pay the license fee prescribed, and that the Act of 1927 amended that statute only by prescribing the license fee above set forth; that Section 9952, Comp. Stat. of Okla. 1921, de-

fines the license year for which said tax is paid as commencing July 1st and expiring June 30th next thereafter. In holding that the tax there in question denied to foreign corporations the equal protection of the laws under the Fourteenth Amendment the Court quoted from the opinion in the Hanover case and the case of *Southern Ry. Co. v. Greene*, 216 U. S. 400. Although the Shaffer Oil & Refining Company case involved a tax law that applied to foreign corporations licensed in Oklahoma for only one year at a time, it apparently was not considered by the Circuit Court of Appeals in deciding the instant case.

(C) *Valid conditions precedent under Oklahoma law.*

Domestic insurance companies of Oklahoma, as well as foreign insurance companies admitted into Oklahoma, are required to file annual statements and to obtain annual licenses to do business as provided by Section 21 of the General Insurance Act of 1909 (Appendix I). Those regulations are not conditions of admission. Therefore the requirement that annual licenses be issued both to domestic and foreign insurance companies does not set the stage at which foreign corporations are put on a level with domestic insurance companies. That stage is set by the requirements of Sections 11 and 18 of the General Insurance Act of 1909 (Appendix I).

Applying the rules announced in the Hanover case, what are the valid conditions precedent to the admission of a foreign insurance company into the state of Oklahoma? Clearly, those valid, conditions precedent are the

requirements that apply and may be fulfilled prior to the admission of the foreign insurance company into the state, to-wit:

1. Payment of the entrance fee under Section 2, Article XIX, of the Constitution, viz: Foreign life insurance company, per annum, \$200.00; foreign accident and health insurance company, per annum, \$100.00. (Petitioner doing both kinds of business paid \$300.00 per annum). It cannot be denied that this is a reasonable charge made annually under the regulatory powers of the State without regard to the period of admission. It is the "annual license fee."
2. Satisfy the Insurance Commissioner that the company is qualified to transact business as prescribed by Section 11 of the General Insurance Act of 1909 (Appendix I);
3. Compliance with the conditions of admission to do business in Oklahoma prescribed by Section 18 of the General Insurance Act of 1909 (Appendix I), which requires: (a) The filing of a copy of its charter and statement of its financial condition; (b) that it satisfy the Insurance Commissioner that it is legally organized under the laws of the foreign state; that it has on deposit with the prescribed officials certain designated securities; (c) that it have a paid-up capital or guaranty capital or surplus of the prescribed amount; and (d) that it appoint the Insurance Commissioner as its service agent.

Those are the requirements that constitute valid conditions precedent under the laws of Oklahoma and that

may be fulfilled before admission or issuance of renewal licenses, as defined in the Hanover case. When such requirements are complied with, the Insurance Commissioner is directed under Section 21 of the General Insurance Act of 1909 (Appendix I) to issue the license.

Those conditions precedent and certain other regulatory provisions imposed by the General Insurance Act of 1909, which we have discussed under our Proposition II (A), are of the same nature as those imposed by the State of Illinois and involved in the Hanover case, which we have discussed under our Proposition I (B). However arbitrary said requirements may be, it is within the discretion of the State to require their fulfillment before the foreign corporation is admitted to do business in the State. But as said in the Hanover case.

"By compliance with the valid conditions precedent, the foreign company is put on a level with all other insurance companies of the same kind, domestic or foreign within the state, and tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the 14th Amendment" (pp. 515-516).

(D) *The operation and effect of the gross premium tax law of Oklahoma precludes its recognition as a valid condition precedent to the issuance of renewal licenses.*

According to the tax law in question, Section 2, Article XIX, of the Constitution of Oklahoma, the General Insurance Act of 1909, the uniform administrative practice and construction in Oklahoma, and the decision of the Circuit Court of Appeals in this case, it is clear that the tax law in question operates and applies after the issuance of the license to the foreign insurance corporation, whether the license is an original or a renewal license. Before the license is renewed for an ensuing license year, the licensee must show payment of the tax that becomes due at the expiration of the current license year as a condition precedent for the renewal license. If the company withdraws from the State at the end of any license year under either an original or a renewal license, it must pay the tax for the privilege that it had exercised and enjoyed under the license expiring at that time. It is a tax on premiums collected in the State, or on business done, and is due after the business has been done and applies as a tax for the privilege exercised before the payment. Its payment is also unlawfully employed as a license fee or condition precedent in the event of the issuance of a renewal license, but the tax is nevertheless still due and owing whether or not the licensee desires a renewal for the ensuing license year.

Since the tax law in question applies after the admission of the foreign insurance company into the State, and

after the issuance of each annual license, and imposes a tax that is a heavy discrimination in favor of similar domestic companies, it offends the equal protection clause of the Federal Constitution. And, as said in the Hanover case:

“Tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and *must conform to the equal protection clause of the 14th Amendment*” (p. 515).

If the tax imposed was not discriminatory, the State, of course could employ the payment thereof as a valid condition precedent to the issuance of renewal licenses, but the Hanover case, as we have shown, holds that a State cannot make past compliance with a tax law that violates the Fourteenth Amendment a condition precedent to a renewal of the license.

IV

The 4% gross premium tax of Oklahoma and the unconstitutional net receipts tax in question in the Hanover case are identical in character and method of application.

The gross premium tax law of Oklahoma is in the same relative position as the unconstitutional and invalid net receipts tax law of Illinois in the Hanover case, for the reasons as follows:

- (a) Said tax under the Oklahoma law is a privilege or occupation tax, as was the net receipt tax of Illinois

when it was before the United States Supreme Court in the Hanover case. (This observation is made to show the relative status of the two laws, although as shown above, the decision on the question of whether the tax violates the Fourteenth Amendment is not dependent upon the character of the tax.)

(b) The net receipts tax of Illinois was held in the Hanover case to be a heavy discrimination in favor of domestic insurance companies of the same class. It is obvious from the stipulation of facts and findings of the trial court that the gross premium tax of Oklahoma is a heavy discrimination in favor of domestic companies of the same class.

(c) A foreign insurance company doing business in Illinois was, as said in the Hanover case, required to renew its license from year to year. A foreign insurance company doing business in Oklahoma is required to renew its license from year to year.

(d) The said discriminatory Illinois net receipts tax law was held in the Hanover case to apply after the foreign insurance company there involved was admitted to do business in Illinois, and therefore to constitute neither a condition precedent to its admission to do business in Illinois nor a valid condition precedent to a renewal of its license in Illinois. Likewise, we have hereinabove shown that under the Constitution and statutes of Oklahoma, the administrative practice in Oklahoma, and the decisions of the court below, the said discriminatory gross premium tax law of Oklahoma applies after the foreign insurance company here involved was admitted to do business in Okla-

homa. Therefore, said tax cannot constitute either a condition precedent to do business in Oklahoma, or a valid condition precedent to a renewal of its license in Oklahoma.

(e) The foreign insurance company involved in the Hanover case was admitted to do business in Illinois and placed on a level with domestic companies of the same class by compliance with the valid conditions precedent hereinabove enumerated, including a compliance with the 1919 insurance premium tax law of Illinois, all of which were capable of fulfillment before said company was admitted to do business in Illinois. The tax under said 1919 law of Illinois constitutes the annual license fee in Illinois, and is in the same relative position as the annual \$300.00 license fee paid by petitioner in Oklahoma. The foreign insurance company here was admitted to do business in Oklahoma and placed on a level with domestic companies of the same class by compliance with the valid conditions precedent hereinabove enumerated, including the payment of the said \$300.00 license fee, all of which were capable of fulfillment before said company was admitted to do business in Oklahoma.

V

The gross premium tax laws of other states afford no authority in the determination of the question in this case.

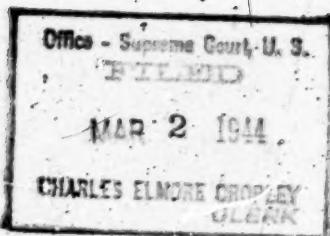
Many states have imposed percentage taxes against premiums collected by foreign insurance companies. Those laws vary in many respects in operation and effect, and

in practically every state the rate of tax imposed is far less than the 4% rate applicable in Oklahoma. We agree with the statement in *New York Life Ins. Co. v. Board of Co. Com'rs*, on page 255; Volume 155 of Oklahoma Reports, 9 Pac. (2d) 936, to the effect that such is an equitable mode of determining what tax burdens should be charged to foreign insurance companies, provided such taxes do not conflict with the Federal Constitution.

The laws of some states apply the tax before admission of the foreign insurance corporation into the State, as was the case of the 1919 law of Illinois incidentally involved in the Hanover case. Other states, like Oklahoma, apply the tax after admission of the foreign insurance corporation into the State, as may be seen from the Kansas case, of *Pacific Mutual Life Ins. Co. v. Hobbs* hereinabove cited. But whether the gross premium tax laws of the various States other than Oklahoma comply with the equal protection clause of the Federal Constitution cannot be determined from the face of such statutes, even though the statutes may apply the tax after admission. Many factors are involved in the determination of that question which cannot be ascertained from the statutes, and evidence would be necessary to determine the respective tax burdens shouldered by domestic and foreign insurance companies of the same class doing business in a given State. The fact that gross premium tax laws of various other States have not been questioned under the equal protection clause of the Federal Constitution is no criterion in the determination of that question regarding the Oklahoma law.

FILE COPY

No. 235



Supreme Court of the United States

(OCTOBER TERM, 1943)

GREAT NORTHERN LIFE INSURANCE COMPANY,
Petitioner,

VERSUS

JESS G. READ, INSURANCE COMMISSIONER
FOR THE STATE OF OKLAHOMA,
Respondent.

REPLY BRIEF OF AMICI CURIAE

JOHN H. MILEY,
RUSSELL V. JOHNSON,
1039 First National Building,
Oklahoma City, Oklahoma,
Amici Curiae.

February, 1944.

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STATEMENT

The statement of the case which appears on pages 1 to 6 of respondent's answer to brief amici curiae pertains to the jurisdiction of this Court and inferentially suggests that this Court withhold its decision herein on the merits of this case until the Supreme Court of Oklahoma hands down its decision in the Lincoln National Life Insurance Company case, and determines the meaning of the Oklahoma constitutional and statutory provisions quoted and discussed in the several briefs filed herein.

The brief of amici curiae is limited to the questions raised upon the merits of this action. Whether or not the

State of Oklahoma has given its consent to be sued for the recovery of taxes other than ad valorem taxes, the complaint of petitioner (R. 3) sets forth special circumstances establishing personal liability against respondent. *A. T. & S. F. Railway Co. v. O'Connor*, 223 U. S. 280, 56 L. ed. 436.

The Supreme Court of Oklahoma in the case of *New York Life Ins. Co. v. Board of County Com'rs* (pp. 48-50, brief amici curiae) has held that the gross premium tax law in question "is a tax on the business" which is "subject to no constitutional limitation or inhibition, except that such taxes and fees 'shall be uniform upon the same class or subjects' and shall not be in conflict with the Federal Constitution."

Regardless of what meaning the Supreme Court of Oklahoma has placed, or might place, upon the law in question, this Court will exercise its independent judgment in determining whether the tax with the meaning given violates the Federal Constitution (pp. 19-24, brief amici curiae).

The 4% Gross Premium Tax Law of Oklahoma does not conform to the equal protection clause of the Fourteenth Amendment for the reasons:

- (1) A like tax is not collected on the premiums of competing domestic insurance companies.
- (2) Domestic insurance corporations are exempted from the insurance premium tax laws of Oklahoma.
- (3) Domestic insurance corporations do not share the

-3-

burden of any other form of taxation fairly equivalent to that imposed upon foreign insurance corporations by said 4% insurance premium tax.

(4) The 4% gross premium tax law of Oklahoma applies a discriminatory tax after the foreign corporation is admitted to do business in Oklahoma and after issuance of each renewal license.

(5) Such invalid tax cannot constitute a valid condition precedent to the issuance of renewal licenses.

Respondent's first proposition on page 7 of answer to brief amici curiae states that the tax is not invalid for the reason numbered (1) above. However, we contend that by reason thereof, together with reasons (2), (3), (4) and (5) above stated, the tax is invalid. All five reasons are fully discussed in the brief amici curiae.

Respondent's argument appearing on pages 7 to 20 of answer to brief amici curiae obviously ignores the operation and effect of the tax law in question and the salient rules and principles announced in the Hanover case. Paragraphs (a) and (b), pages 7 and 8 of respondent's answer to brief amici curiae, contain faulty, misleading, and confusing statements of the contentions of amici curiae. In order to clarify any misunderstanding which might result, reference is made to the brief amici curiae.

The brief amici curiae reveals that according to the Constitution and Statutes of Oklahoma, the uniform administrative practice since statehood, the findings of the trial court and the Circuit Court of Appeals in the case at bar, and the findings of the trial court in the Lincoln Na-

tional Life Insurance Company case, the gross premium tax law in question operates and applies after a foreign insurance corporation is first admitted into Oklahoma and after the issuance of each annual renewal license. (Proposition II, pp. 41-56, brief amici curiae).

The Oklahoma Supreme Court has held that the law imposes a tax on the business done (pp. 48-49, brief amici curiae). It is payable at the end of the license year for the privilege of having done business in the State (p. 45, brief amici curiae).

The tax is measured solely on gross premiums collected in the state. Therefore, the law cannot apply until after the foreign company is admitted into the state and does business. If the foreign company withdraws from the state at the end of its first license year, the tax is then due and must be paid. If it renews its license and withdraws from the state at the end of its second or any subsequent renewal license year, the tax is then due and must be paid. (Proposition III, pp. 63-67, brief amici curiae).

The law clearly applies the tax after admission of the foreign corporation into the state, whether it be admitted for an indefinite period or for only one year at a time. The tax is admittedly discriminatory, and since it applies after admission of the foreign company into the state it violates the equal protection clause of the Fourteenth Amendment (Proposition [D], p. 34, brief amici curiae).

Whether the foreign company be licensed for an indefinite period or for only one year at a time, the principle is the same that, pending the period of business per-

mitted, the state must not enforce against its licensees unconstitutional burdens (p. 40; brief amici curiae).

Since the law applies a tax after the admission of the foreign corporation into the state for the first license year and after the issuance of each annual renewal license, and which tax becomes due at the end of each license year for the privilege of having done business in the state, it must be considered as a law enacted for the purpose of raising revenue for the state. Such laws must conform to the equal protection clause of the Fourteenth Amendment (Proposition [D], p. 34, brief amici curiae). Since the tax is admittedly discriminatory, it therefore constitutes an invalid tax. Being an invalid tax, it cannot be exacted upon the withdrawal of the foreign company from the state at the end of its first or any subsequent renewal license year. Being an invalid tax at the end of every license year, its payment cannot be made a valid condition precedent to a renewal of the annual license (Proposition [E], p. 36, brief amici curiae).

The example stated by respondent at the bottom of page 9 of answer to brief amici curiae is radically different from the manner in which the tax law in question operates and applies. The respondent states:

"For example, if said contention is sound, a state law would be invalid under the Fourteenth Amendment which expressly imposes a discriminatory license fee or tax of \$1,000.00 on a foreign corporation for the right or privilege of entering the state and doing business therein for a period of either one or twenty years, if said law provides that one-half of said fee is payable on or prior to the commencement of said period and the other one-half payable ten days thereafter."

It may be observed therefrom that before the foreign corporation is admitted into the state the license fee of \$1,000.00 is established. Its determination is not dependent upon business done *after* admission of the foreign company into the state. It is not a tax on business done and it is not exacted after the privilege of doing business has been exercised. It is a "license fee" and is distinguishable from the license tax imposed by the gross premium tax law in question. Whether the exaction is a valid excise tax, as distinguished from a valid license or admission fee, involves inquiry regarding the operation and effect of the tax law (pp. 21-24, brief *amici curiae*).

We take no issue with respondent's contention that annual privilege taxes may be paid either before or after the exercise of the privilege. We neither argue nor infer that the tax law in question is invalid because it is a privilege tax. The character of the tax is immaterial. The controlling test is to be found in the operation and effect of the law as applied and enforced by the state. But if a privilege tax operates and applies after admission of a foreign corporation into the state, it must conform to the equal protection clause of the Federal Constitution. The 4% privilege tax here in question applies to business done and is determined and paid at the end of each license year and after the privilege is enjoyed.

Respondent concludes the first proposition stated in his answer to brief *amici curiae* with the suggestion that the law in question is susceptible of a construction that would relieve foreign insurance companies from the payment of the gross premium tax for the privilege enjoyed

during the first license year. We have shown in our brief *amici curiae* that such construction would violate the express provisions of the constitutional and statutory provisions of Oklahoma. It would be contrary to the uniform administrative practice and interpretation of such laws since statehood and the decision of the Oklahoma Supreme Court in the New York Life Insurance Company case. We have further shown that it is not to be presumed that the Legislature intended to exempt foreign insurance companies from taxation upon their first year's business (pp. 41-52, brief *amici curiae*).

The construction of the law so suggested by respondent is obviously predicated upon the assumption that this Court will hold that the admission of foreign insurance companies into Oklahoma is limited to the period of the annual license, and that this Court will permit the state to deal arbitrarily with foreign corporations under the guise of conditions precedent to the issuance of annual renewal licenses. We do not so interpret the trend of the decisions of this Court subsequent to the Philadelphia Fire Association case. In this regard may we respectfully direct the Court's attention to our discussion of this question on pages 63 to 77 and pages 81-85 of the brief *amici curiae*.

Respectfully submitted,

JOHN H. MILEY.

RUSSELL V. JOHNSON.

1039 First National Building,
Oklahoma City, Oklahoma.

Amici Curiae.

February, 1944.



CONCLUSION

In conclusion, we desire to point out that if domestic insurance companies of Oklahoma were also subjected to the tax law here in question, or if the rate of the tax imposed solely against foreign insurance companies resulted in foreign and domestic insurance corporations sharing fairly equivalent tax burdens, no complaint would be justified. Under the 2% rate applicable in Oklahoma during practically 35 years prior to the increase of the rate to 4% under the 1941 amendment, foreign insurance companies in Oklahoma did not bring the law into question. Whether there existed any substantial inequality of tax burdens as between domestic and foreign insurance companies before the increase has never been judicially determined.

Whatever view foreign insurance companies may have taken regarding the former 2% rate, we find the 4% rate is such a heavy discrimination in favor of domestic companies of the same class that we are impelled to strenuously resist the imposition. This question is of vital importance to the business of insurance in the State of Oklahoma.

The Hanover case does not permit speculation as to whether the State in dealing with foreign corporations violates the equal protection clause of the Federal Constitution. Disguise and manipulation by the State and its administrators should not be countenanced for, as stated in the case of *Marion L. Frost et al. v. Railroad Commis-*

sion of the State of California, cited under our Proposition I (E), the guaranties of the Federal Constitution could in that manner be manipulated out of existence.

The tax law in question is a form of unconstitutional discrimination, the vicious nature of which was sensed fully by Justice BRADLEY in the minority opinion in *Doyle v. Continental Ins. Co.*, 94 U. S. 535, (such minority opinion now being the law governing this Court). In that case Mr. Justice BRADLEY says:

"The conditions of society and the modes of doing business in this country are such that a large part of its transactions is conducted through the agency of corporations. This is especially true with regard to the business of banking, insurance and transportation. Individuals cannot safely engage in enterprises of this sort, requiring large capital. They can only be successfully carried out by corporations, in which individuals may safely join their small contributions without endangering their entire fortunes. To shut these institutions out of neighboring States would not only cripple their energies, but would deprive the people of those States of the benefits of their enterprise. The business of insurance, particularly, can only be carried on with entire safety by scattering the risks over large areas of territory, so as to secure the benefits of the most extended average. The needs of the country require that corporations, at least those of a commercial or financial character, should be able to transact business in different States. If these States can, at will, deprive them of the right to resort to the courts of the United States, then, in large portions of the country, the Government and laws of the United States may be nullified and rendered inoper-

ative with regard to a large class of transactions constitutionally belonging to their jurisdiction.

"The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the State and General Governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance."

It is well established by the decisions of this Court cited herein, that a State may not exact as a condition of the corporations engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. By following the same line of reasoning employed in the above quotation from the opinion in *Doyle v. Continental Insurance Company, supra*, it may be said that if the States can limit the period of admission of foreign insurance corporations to one year at a time, and then as a condition precedent to the annual readmission, deal arbitrarily with such foreign corporations, the guaranties of the Federal Constitution would be avoided.

The requirements of the Oklahoma law that insurance corporations obtain annual licenses is a proper regulation of the business of both domestic and foreign insurance companies. The business of insurance is of a continuing nature requiring large capital and investments. Both domestic and foreign companies are regulated on a continuing basis subject to rigid requirements to safeguard the lawful right and powers of the state. Adequate

provisions are made for the termination of the right of such companies to continue to do business in the state if they violate the laws of the state. We fail to see how such requirements applying to both domestic and foreign insurance companies can fairly be interpreted as limiting the period of admission of foreign insurance companies to the period of each annual license.

What could be the purpose behind the law of any state that expressly limits the period of admission of foreign corporations to one year and at the same time establishes the procedure for annual readmissions, other than to subject such corporations to arbitrary treatment at the will of the state? What could be the state's purpose in so doing, other than to excuse its arbitrary exactions under the guise of conditions precedent to the annual readmission? Under such practice the foreign corporation may in reality be within the limits of the state for many years but at all times subject to discrimination in favor of similar domestic corporations. A state should not be presumed to have limited the admission of foreign corporations into the state to a definite period in the absence of clear and express language to that effect. But where it is found that the state so intended, the practice should meet with condemnation from this Court. The qualification in the power of the state to impose conditions upon admission of foreign corporations within its limits as expressed in the earlier decisions of this Court has been necessarily extended from time to time in order to assure the preservation of the guaranties of the Federal Constitu-

tion. The effect of an attempt by the state to limit the period of admission of a foreign insurance company to one year at a time is just as offensive as the situations dealt with in the class of cases considered in the opinion in the Hanover case.

Whether foreign corporations are admitted into Oklahoma for an indefinite period or for one year at a time, the tax law here in question applies a discriminatory tax after the issuance of the license each year and can not constitute a valid condition precedent either to an annual admission or the renewal of the annual license.

We respectfully submit that the gross premium tax law of Oklahoma (Tit. 36, Okla. Stat. 1941, sec. 104) is repugnant to the guaranties of the Fourteenth Amendment; that any such law is repugnant to the guaranties of the Fourteenth Amendment if the rate of taxation prescribed thereunder results in discrimination in favor of similar domestic insurance companies.

Respectfully submitted,

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Amici Curiae.

January, 1944.

APPENDIX I

GENERAL INSURANCE ACT OF 1909

(Ch. 21, Art. I, p. 312, Session Laws of Oklahoma 1909, approved March 17, 1909.)

Sec. 5.—(Sec. 8, Tit. 36, Okla. Stat. 1941—*Business Limited by Certificate—Other Restrictions on Business Carried On*):

"No company shall be formed in this state or foreign company admitted to this state, for the purpose of engaging in any kind of insurance; other than that specified in its certificate of incorporation, original or amended, nor any kind of business except that allowed domestic corporations under this act."

Sec. 11.—(Sec. 47, Tit. 36, Okla. Stat. 1941—*Certificates Issued—Commissioner to Examine First—Books and Records*):

"Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance, the Insurance Commissioner shall be satisfied, by such examination as he may make and such evidence as he may require, that such company is otherwise duly qualified under the laws of the state to transact business herein."

Sec. 12.—(Sec. 48, Tit. 36, Okla. Stat. 1941—*Examination and Audit of Domestic Companies*): Contains requirements for the examination of domestic insurance companies by the Insurance Commissioner.

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Sec. 13.—(Sec. 49, Tit. 36, Okla. Stat. 1941—Examination and Audit of Foreign Companies):

"Whenever the Insurance Commissioner deems it prudent for the protection of the policy holders of this state, he shall, in like manner, visit and examine or cause to be visited and examined by some competent person or persons whom he may appoint for that purpose, any foreign insurance company applying for admission or already admitted to do business in this state."

Sec. 15.—(Sec. 51, Tit. 36, Okla. Stat. 1941—Foreign Companies' Authority Revoked, When—Manner):

"If the Insurance Commissioner is of the opinion, upon examination or other evidence, that any foreign insurance company is in an unsound condition or has failed to comply with the law or with the provisions of its charter or that its condition is such as to render the proceedings hazardous to the public or to its policy holders or that its actual funds, exclusive of capital stock, are less than its liabilities, or if it or its officers, directors, trustees or agents refuse to submit to an examination or to perform any legal obligation relative thereto or fail to pay any final judgment against it by a citizen of this state, he shall revoke or suspend all certificates of authority granted to it or its agents and shall cause notification thereof to be published in one or more newspapers of general circulation in the state, and no new business shall thereafter be done by it or its agents in this state while such default or disability continues; nor until its authority to do business is restored by the Insurance Commissioner; provided, however, that unless the ground for revocation or suspension relates only to the financial condition or the sound-

ness of the company or to a deficiency in its assets, he shall notify the company, not less than ten days before revoking its authority to do business in this state, and he shall specify in the notice the particulars of the supposed violation."

Sec. 18, as amended, being Sec. 101, Tit. 36, Okla. Stat.

1941:

(*Foreign Insurance Companies—Conditions of Admission to do Business*):

"No foreign insurance company shall be admitted and authorized to do business in this State until:

"First: It shall file or deposit with the insurance commissioner a properly certified copy of its charter, or deed of settlement, and a statement of its financial condition and business on the thirty-first day of December preceding the day on which it shall apply for permission to transact such business, including such other information and in such form and detail as the insurance commissioner may require, signed and sworn to by its president and secretary and other proper officers.

"Second: It shall satisfy the insurance commissioner that it is fully and legally organized under the laws of its state or government to do the business it proposes to transact in this State; that, if a life insurance company, a surety company or a bond company, it has on deposit with the Treasurer of this State or with the proper officer of some other state, securities to the actual cash value of at least one hundred thousand dollars consisting of the bonds of this State, the United States, or the state in which such company is organized, or notes or bonds secured by mortgages on improved real estate worth double the amount of such

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notes or bonds, and such company shall file with the insurance commissioner the certificate of the official with whom its securities are deposited stating the time and amount of each of said bonds, notes or stocks, and that he is satisfied that they are worth one hundred thousand dollars, and that the deposit is made with him by the company for the protection of all its policy holders and creditors in the United States. Provided, that surety and bond companies shall be required to have not less than four hundred thousand dollars paid up capital in cash or invested in such securities, as, under the laws of this State, domestic companies are allowed to invest in, which are satisfactory to the insurance commissioner.

"Third: Insurance companies, other than surety and bond companies, shall be required to have a paid up capital or guaranty capital or surplus of not less than one hundred thousand dollars in cash or invested in securities satisfactory to the insurance commissioner and consisting of such securities as under the laws of this State, domestic companies are allowed to invest in; provided, however, that the funds of such foreign insurance companies in excess of such minimum of one hundred thousand dollars may at all times be invested in such securities as are or may be authorized by the laws of the State in which such companies are organized or in which they have and maintain their United States deposit. Nothing in this Section shall be construed to permit the admission of mutual companies other than as provided in Section 3 of this Act, except fraternal and benevolent orders and societies.

"Fourth: It shall, by duly executed instrument filed in his office, constitute and appoint the insurance commissioner, or his successor, its true and lawful attorney, upon whom all lawful processes in any action or

legal proceeding against it may be served and therein shall agree that any lawful process against it, which may be served upon its said attorney, shall be of the same force and validity as if served upon the company, and that the authority thereof shall continue in force, irrevocable, as long as any liability of the company remains outstanding in this State. Any process issued by any court of record in this State, and served upon such commissioner by the proper officer of the county in which said commissioner may have his office, shall be deemed a sufficient process on said company, and it is hereby made the duty of the insurance commissioner to promptly, after such service of process, forward by registered mail, an exact copy of such notice to the company; or, in case the company is of a foreign country, to the resident manager in this country; and also shall forward a copy thereof to the general agent of said company in this State. For power of attorney, each company shall pay a fee of three dollars, and for each copy of process, the insurance commissioner shall collect the sum of three dollars, which shall be paid by the plaintiff at the time of such service, the same to be recovered by him as part of the taxable cost, if he prevails in his suit. (R. L. 1910, Secs. 3421, 3422; Laws 1910-11, ch. 93, p. 203, Sec. 1; Laws 1925, ch. 131, p. 196, Sec. 1.)"

Sec. 21—(Sec. 56, Tit. 36, Okla. Stat. 1941—Annual Statement by Companies—Annual License):

"The Insurance Commissioner shall, in December of each year furnish to each of the insurance companies, authorized to do business under the provisions of this act, two or more blanks in form adopted for their annual statement, and such companies shall, annually, on or before the last day of February, file in the office of

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the Insurance Commissioner a statement which shall exhibit its financial condition on the 31st day of December of previous year and its business of that year. For good cause shown, the Commissioner may extend the time within which such statement may be filed. Every such annual statement shall be in the form and of the specifications the Insurance Commissioner may require. The assets and liabilities shall be computed and allowed in accordance with the laws of this state. Such statement shall be subscribed and sworn to by the president and secretary and other proper officers. And if the Insurance Commissioner finds that the facts warrant, and that all laws applicable to said company are fully complied with, he shall issue to said company

a license or certificate of authority, subject to all requirements and conditions of the law, to transact business in this state, specifying in said certificate the particular kind or kinds of insurance it is authorized to transact, and said certificate shall expire on the last day of February next after its issue. The annual statement of a company of a foreign country shall embrace only its business and condition in the United States, and shall be subscribed and sworn to by its resident manager or principal representative in charge of its American business."

Sec. 22, as amended, being Sec. 10478, Okla. State
1931:

(*Foreign Companies—Annual Report of Premiums—Fees and Taxes*):

"Every foreign insurance company doing business in this State under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief

officer of such company to the insurance commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January or since the last return of such premiums was made by such company; and shall at the same time pay to the insurance commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of two per cent on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said insurance commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the insurance commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the insurance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State."

Sec. 25, as amended, being Sec. 121, Tit. 36, Okla. Stat.

1941:

(Agents—License of Agents):

"Upon written notice by an authorized foreign insurance company of its appointment of a suitable person to act as its agent within this State, and the payment of three dollars, the Insurance Commissioner shall, if the facts warrant it, grant to such person a

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license, which shall state in substance that the company is authorized to do business in this State and that the person named therein is a constituted agent of the company for the transaction of such business as it is authorized to do in this State: Provided, that domestic insurance companies shall pay fifty cents, only, for each agent's license. Said license shall continue in force until the last day of February next after its issue, and, by the renewal thereof, on the annual payment for such renewal of three dollars, if a foreign company, and if a domestic company, on the annual payment of fifty cents, until revoked by the Insurance Commissioner for non-compliance with the laws or until the company, by written notice to the Insurance Commissioner, cancels the agent's authority to act for it. While such license remains in force, the company shall be bound by the acts of the person named therein within his authority as its acknowledged agent. (R. L. 1910, Sec. 3429.)"

Sec. 26, as amended, being Sec. 122, Tit. 36, Okla. Stat. 1941:

(Violation by Agent a Misdemeanor—Penalty):

"Whoever shall, directly or indirectly, aid in transacting insurance business for any such company without first receiving such certificate of authority, or after receiving from such Insurance Commissioner notice of the revocation thereof continue to act as agent for any such company, shall be deemed to be guilty of a misdemeanor, and upon conviction by a court having jurisdiction, be fined not less than one hundred dollars nor more than five hundred dollars; the issuance of each policy or contract shall constitute a separate and distinct offense. (R. L. 1910, Sec. 3430.)"

Sec. 29, as amended, being Sec. 124, Tit. 36, Okla. Stat.
1941:

(Personal Liability of Agent—Unlawful Contract):

“Every agent or other person shall be personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for or on behalf of any insurance company not authorized to do business in this State. (R. L. 1910, Sec. 3432.)”

Sec. 31—(Sec. 126, Tit. 36, Okla. Stat. 1941—Resident Agents for Foreign Companies—Exceptions):

“Foreign companies admitted to do business in this state shall make contracts of insurance upon lives, property or interests herein, only through lawfully constituted and licensed resident agents: * * *”

Sec. 61, as amended, being Sec. 199, Tit. 36, Okla. Stat.
1941:

(General Agency in State Required):

“All life insurance companies doing business under the laws of this State shall be required to maintain a general agency within the State, in charge of a resident general agent. (R. L. 1910, Sec. 3464.)”

APPENDIX II

Sec. 1, Ch. 1-a, Tit. 36, Session Laws of Oklahoma, 1941—House Bill No. 353, Sec. 104, Tit. 36, Okla. Stat. 1941, (effective April 25, 1941).

(*Foreign Companies, Copartnerships, etc., and Non-residents—Annual Report of Premiums—Fees and Taxes*):

"Every foreign insurance company, copartnership, association, inter-insurance exchange or individual who is a non-resident of the State of Oklahoma, doing business in the State of Oklahoma in the execution of exchange contracts of indemnity, or as an insurance company of any nature or character whatsoever, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of four per cent (4%) on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted which tax, in addition to an annual tax of three dollars (\$3.00) on each agent, to be paid to the State Insurance Board as now provided by Section 10542, Oklahoma Statutes, 1931, shall be in lieu of all other taxes or fees, and the taxes and fees of any sub-division or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of

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said taxes, the sum of five hundred dollars (\$500.00); and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State." (Session Laws of Oklahoma 1941, p. 121—Sec. 104, Tit. 36, Okla. Stat. 1941).

APPENDIX III

ILLINOIS PREMIUM TAX ACT OF 1919

(Act of June 28, 1919)

"An Act in Relation to the Taxation of Non-resident Corporations, Companies, and Associations for the Privilege of Doing an Insurance Business in this State.

"Section 1. BE IT ENACTED BY THE PEOPLE OF THE STATE OF ILLINOIS, REPRESENTED IN THE GENERAL ASSEMBLY: That each non-resident corporation, company, and association licensed and admitted to do an insurance business in this State shall, except as herein otherwise provided, pay an annual state tax for the privilege of doing an insurance business in this State, equal to two per centum of the gross amount of premiums received during the preceding calendar year * * *.

* * * * *

"Section 6. * * * the tax herein provided to be paid shall be due and payable on the first day of July of each year, and shall be the tax for the year commencing on the first day of July in which it is due and ending on the thirtieth day of June next thereafter.

* * * * *

“Section 9. On or before the fifteenth day of May of each year, the Department of Trade and Commerce shall mail a notice in writing to each corporation, company, and association against which a tax is assessed, stating the amount of the tax assessed against it for the year next ensuing commencing on July 1, * * *. Such notice shall further state that the tax therein assessed is payable to the Department of Trade and Commerce on July 1, after the date of said notice.

* * *

“Section 13. Each corporation, company, or association applying for a license to do an insurance business in this State, and which was not licensed to do such business in this State during the preceding calendar year, or any part thereof, shall, before said license is issued, pay to the Department of Trade and Commerce at the rate of three hundred dollars per annum for as many months as will elapse between the date of issuance of such license and the first day of July of the calendar year succeeding the calendar year in which such license is issued, and such payment shall be for the privilege of doing an insurance business in this State, during the period aforesaid.

* * *

“Section 15. The authority of each non-resident corporation, company, and association, admitted to do an insurance business in this State, shall be evidenced by a license to be issued by the Department of Trade and Commerce, in which shall be stated the kind or kinds of insurance business authorized to be transacted. All licenses issued by virtue of the provisions hereof shall terminate on the thirtieth day of June next after the date thereof, and may be renewed annually thereafter upon compliance with the laws of this State.

* * *” (Ch. 73, Cahill's Rev. Stat. of Illinois, 1925.)

SUPREME COURT OF THE UNITED STATES.

No. 235.—OCTOBER TERM, 1943.

Great Northern Life Insurance Company, Petitioner,

vs.

Jess G. Read, Insurance Commissioner for the State of Oklahoma.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[April 24, 1944.]

Mr. Justice REED delivered the opinion of the Court.

This writ brings here for review the action of petitioner, a foreign insurance company, to recover taxes paid to respondent, the Insurance Commissioner of Oklahoma, which were levied by Section 10478, Oklahoma Statutes 1931, as amended by Chapter 1(a), Title 36, Session Laws of Oklahoma 1941. This was an annual four per cent tax on premiums received by foreign insurance companies in Oklahoma, and it, together with certain specified fees, was in lieu of all other taxes and fees in Oklahoma. Petitioner paid the tax under protest and, alleging diversity of citizenship, 28 U. S. C. § 41, brought suit against the Insurance Commissioner in the District Court of the United States. The procedure for recovery is laid down by Section 12665, Oklahoma Statutes 1931.¹

¹ "12665. Payment Under Protest Where Relief by Appeal Not Provided
—Action to Recover.

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit." All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

The percentage of premiums due was increased from two to four per cent by the amendment of 1941, effective April 25th of that year. The District Court refused recovery. The Circuit Court of Appeals affirmed. *Great Northern Life Insurance Co. v. Read*, 136 F. 2d 44. Certiorari was granted on petitioner's assertion of error in requiring it to pay a tax allegedly discriminatory under the Fourteenth Amendment as compared with the taxation of domestic insurance companies, and also unconstitutional as levied after the company's admission to the state and on premiums collected during the business year for which a license was already in force. A conflict in principle was suggested with *Hanover Fire Insurance Company v. Harding*, 272 U. S. 494. We granted certiorari, 320 U. S. 726, and asked discussion of the right of petitioner to maintain its suit in a Federal court. As we conclude that this suit could not be maintained in the Federal court, we do not reach the merits of the issue as to the validity of the tax.

The right of petitioner to maintain this suit in a Federal court depends, first, upon whether the action is against an individual or against the State of Oklahoma. Secondly, if the action is determined to be against the state, the question arises as to whether or not the state has consented to suit against itself in the Federal court.

Respondent challenged the right of petitioner to seek relief in the District Court by the defense in its answer that the complaint fails to state a claim upon which relief can be granted. R. C. P. 12(b) and (e).² This challenge, on the ground that the state had not consented to be sued, was sustained by the District Court. The contention is available here to sustain the judgment on appeal. *LeTulle v. Scofield*, 308 U. S. 415.

In *Smith v. Reeves*, 178 U. S. 436, an action was instituted in the Federal trial court by railroad receivers against the defendant "as Treasurer of the State of California" to recover taxes assessed against and paid by the railroad. The proceeding was brought under Section 3669 of the California Political Code, as amended

² There is here no want of jurisdiction of the parties or subject matter. We are not passing upon a certification of an issue as to jurisdiction such as arose under the Act of March 3, 1891, § 5, 26 Stat. 827, in *Illinois Central Railroad Co. v. Adams*, 180 U. S. 28, 37. If this is a suit against the state, a failure to show the state's consent to be sued in the face of this answer would be fatal. Cf. *Berryessa Cattle Co. v. Sunset Pacific Oil Co.*, 87 F. 2d 972, 974.

by California Statutes (1891) 442, which authorized a suit against the State Treasurer for the recovery of taxes which were illegally exacted. The defendant could demand trial of the action in the Superior Court of the County of Sacramento, California. If the final judgment was against the Treasurer, the Comptroller of the state was directed to draw his warrant on state funds for its satisfaction.

As the suit was against a state official as such, through proceedings which were authorized by statute, to compel him to carry out with the state's funds the state's agreement to reimburse moneys illegally exacted under color of the tax power, this Court held, p. 439; it was a suit against the state. The state would be required to pay.³ The case therefore is plainly distinguishable from those to recover personally from a tax collector money wrongfully exacted by him under color of state law, *Atchison &c. Ry. Co. v. O'Connor*, 223 U. S. 280; cf. *Matthews v. Rodgers*, 284 U. S. 521, 528; to recover under general law possession of specific property likewise wrongfully obtained or held, *Tindal v. Wesley*, 167 U. S. 204, 221; *Virginia Coupon Cases*, 114 U. S. 269, 285; *United States v. Lee*, 106 U. S. 196; to perform a plain ministerial duty, *Board of Liquidation v. McComb*, 92 U. S. 531, 541; *Rolston v. Missouri Fund Com'r's*, 120 U. S. 390, 411; or to enjoin an affirmative act to the injury of plaintiff, *Sterling v. Constantin*, 287 U. S. 378, 393; *Tomlinson v. Branch*, 15 Wall. 460; *Davis v. Gray*, 16 Wall. 203, 220; *In re Tyler*, 149 U. S. 164, 190. Only in *Smith v. Reeves* was the action authorized by statute against the officer in his official capacity. In the other instances relief was sought under general law from wrongful acts of officials. In such cases the immunity of the sovereign does not extend to wrongful individual action and the citizen is allowed a remedy against the wrongdoer personally.

This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. *Chandler v. Dix*, 194 U. S. 590; *Fitts v. McGhee*, 172 U. S. 516, 529; *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 167; *Lankford v. Platte Iron Works*, 235 U. S. 461, 468 *et seq.*; *Ex parte State of New York, No. 1*, 256 U. S. 490, 500; *Worcester County Co. v. Riley*, 302 U. S. 292, 296, 299.

³ *Pennoyer v. McConaughy*, 140 U. S. 1, 10. Compare *Louisiana v. Jumel*, 107 U. S. 711, 726.

Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. *Monaco v. Mississippi*, 292 U. S. 313, 320; *Louisiana v. Jumel*, 107 U. S. 711, 720. A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment. The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent. *Hans v. Louisiana*, 134 U. S. 1, 10, 16.

Oklahoma provides for recovery of unlawful exactions paid to its collectors under protest. Section 12665 Oklahoma Statutes 1931. Note 1, *supra*. In our view of this case it is unnecessary for us to pass upon whether this method of protecting taxpayers was intended to be exclusive of all other remedies, including actions against an individual who happened to be a tax collector, or whether if it were so intended it would surmount all constitutional objections. Compare *Burrill v. Locomobile Co.*, 258 U. S. 34, and *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 341-43. See also *Antrim Lumber Co. v. Sneed*, 175 Okla. 47, 49-51, 52 P. 2d 1040, 1043-45.

A suit against a state official under Section 12665 to recover taxes is held to be a suit against the state by Oklahoma and the remedy exclusive of other state remedies. *Antrim Lumber Co. v. Sneed*, *supra*, 175 Okla. at 51, 52 P. 2d at 1045. This interpretation of an Oklahoma statute by the Supreme Court of the state accords with our view, as set out above, of the meaning of a suit against a state. Petitioner brought this action against the collector, the Insurance Commissioner, in strict accord with the requirements of Section 12665. It alleged that there was no appeal provided by Oklahoma laws from defendant's action in collecting and gave notice of protest and suit to defendant at the time of payment in the language of the Section. By so doing petitioner was relieved of the necessity of establishing that the payment was not voluntary⁴ and obtained the advantage of a statutory lien *lis pendens* on the tax payment.

⁴Board of Com'rs Love Co. v. Ward, 68 Okla. 287, 288; Broadwell v. Board of Com'rs Carter Co., 71 Okla. 162, 163; cf. Ward v. Love Co., 253 U. S. 17, 22; Broadwell v. Carter Co., 253 U. S. 25; Carpenter v. Shaw, 280 U. S. 363, 369; Railroad Co. v. Commissioners, 98 U. S. 541, 544; Stratton v. St. L. S. W. Ry., 284 U. S. 530, 532.

By Section 12665, Oklahoma creates a judicial procedure for the prompt recovery by the citizen of money wrongfully collected as taxes. It is the sovereign's method of tax administration. Oklahoma designates the official to be sued, orders him to hold the tax, empowers its courts to do complete justice by determining the amount properly due and directs its collector to pay back any excess received to the taxpayer. The state provides this procedure in lieu of the common law right to claim reimbursement from the collector. The issue of coercion and duress was eliminated at the pre-trial conference without objection by the petitioner. The section makes sure the taxpayer's recovery of illegal payments. The section is like the California statute involved in *Smith v. Reeves, supra*, except for the immaterial difference that the money collected is directed to be held separate and apart by the collector instead of being held in the general funds of the State Treasurer. See § 3669, California Political Code, as amended by California Statutes (1891) 442. In the *Reeves* case, as here, the suit was against the official, not the individual. The Oklahoma section differs from the Colorado law, Section 6, Chapter 211, Session Laws of Colorado 1907, considered in *Atchison &c. Ry. Co. v. O'Connor, supra*, in that the Colorado statute left the taxpayer to his remedy against the collector and merely directed the refund of the tax by the Treasurer in accordance with any judgment or decree which might be obtained. In the *O'Connor* case, in accordance with the statute, the suit, as this Court's opinion shows, was against the individual, not the official. We are of the view that the present proceeding under § 12665 is like *Smith v. Reeves*, a suit against the state.

But it is urged that if this is a suit against the state, Oklahoma has consented to this action in the Federal court. Cf. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 391.

The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government, while its rigors are mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign. The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedure. *Antrim Lumber Co.*

v. *Sneed*, 175 Okla. 47, 52 P. 2d 1040; *Patterson v. City of Checotah*, 187 Okla. 587, 103 P. 2d 97; *Beers v. State of Arkansas*, 20 How. 527; *Kawanananakoa v. Polyblank*, 205 U. S. 349; *Minnesota v. United States*, 305 U. S. 382, 388; *United States v. United States Fidelity & Guaranty Co.*, 309 U. S. 506, 512.⁵ The immunity may, of course, be waived. *Clark v. Barnard*, 108 U. S. 436, 447. When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the Federal courts to be astute to read the consent to embrace Federal as well as state courts. Federal courts, sitting within states, are for many purposes courts of that state, *Traction Company v. Mining Company*, 196 U. S. 239, 255, but when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.⁶

The Oklahoma section in question, 12665, was enacted in 1915 as a part of a general amendment to then existing tax laws. Session Laws 1915, p. 149, Chap. 107, Art. One, subdivision B, sec. 7.⁷ This subdivision of the act of 1915 is concerned with administrative review of boards of equalization and provides a complete procedure including review by the district and Supreme Court of Oklahoma, as the case may be, which are given authority to affirm, modify or annul the action of the boards. Sections 2 and 3. Section 6 requires the payment of the taxes which fall due, pending administrative review, and provides for recovery of such taxes in accordance with the ultimate finding on review in language practically identical with that of Section 7 (§ 12665) here involved. Furthermore, section 12665 gives directions to the Oklahoma officer as to his obligations, requires the court to give precedence to these cases and directs the kind of judgment to be returned, see note 1, *supra*, which is quite different in language, if not in effect, from the judgment a Federal court would render. It is clear to us that the legis-

⁵ *Keifer & Keifer v. R. F. C.*, 306 U. S. 381, is not to the contrary. When authority to sue is given that authority is liberally construed to accomplish its purpose. *United States v. Shaw*, 309 U. S. 495, 501.

⁶ Cf. *Matthews v. Rodgers*, 284 U. S. 521, 525. The Federal Government's consent to suit against itself, without more, in a field of federal power does not authorize a suit in a state court. *Stanley v. Schwalby*, 162 U. S. 255, 270; *Minnesota v. United States*, 305 U. S. 382, 384, 389.

⁷ See also Session Laws 1913, Ch. 240, Art. 1, sec. 7.

lature of Oklahoma was consenting to suit in its own courts only. *Chandler v. Dix*, 194 U. S. 590.

Smith v. Reeves, *supra*, p. 445, holds that an act of a state is valid which limits to its own courts suits against it to recover taxes. There California's intention to so limit was made manifest by authorizing the state officer to demand trial in the Superior Court of Sacramento County. *Atchison &c. Ry. Co. v. O'Connor*, considered above at p. 5, is not applicable since it was not a suit against the state.

Petitioner urges that *Smyth v. Ames*, 169 U. S. 466, 517, and *Reagan v. Farmers' Loan and Trust Company*, 154 U. S. 362, 391, 392, are precedents which lead to a contrary conclusion on this issue of the suability of Oklahoma in the District Court of the United States. The former is clearly inapposite. That case involved proceedings to enjoin enforcement of an allegedly unconstitutional state statute providing for intrastate railroad rates. Since the state act provided a remedy, the state took the position that Federal equity jurisdiction was ousted. This Court held the Federal equity jurisdiction continued to restrain unconstitutional acts by state officers which threatened irreparable damage. Pp. 474, 477, 515-19.

In the *Reagan* case, a proceeding for injunction to restrain the members of the Texas Railroad Commission from enforcing rates which were alleged to be unconstitutional was allowed to be maintained in equity in a Federal court. This Court said it was maintainable against the defendants both under the general equity jurisdiction of the Federal courts and under the provisions of the state statute which allowed review "in a court of competent jurisdiction in Travis County, Texas" It was thought that the United States Circuit Court, sitting in Travis County, was covered by this language. As it was concluded, however, that this was not a suit against the state, page 392, we do not feel impelled to extend the ruling of the *Reagan* case on this alternative basis of jurisdiction to a suit, such as this, against a state for recovery of taxes.

Gunter v. Atlantic Coast Line, 200 U. S. 273, is also distinguishable. There the Attorney General of South Carolina appeared in a Federal court to answer for the state in an injunction suit under the authority of a statute which read as follows:

"if the State be interested in the revenue in said action, the county auditor shall, immediately upon the commencement of said action, inform the Auditor of State of its commencement, of the alleged cause thereof, and the Auditor of State shall submit the same to the Attorney General, who shall defend said action for and on behalf of the State." P. 286.

This Court construed this to consent to an appearance in the Federal court and held its decision *res judicata* against the state and added at p. 287:

"If there were doubt—which we think there is not—as to the construction which we give to the act of 1868, that doubt is entirely dispelled by a consideration of the contemporaneous interpretation given to the act by the officials charged with its execution, by the view which this court took as to the real party in interest on the record in the Pegues case, and by the action as well as non-action which followed the decision of that case by the state government in all its departments through a long period of years."

The administrative construction by a state of these statutes of consent have influence in determining our conclusions. Cf. *Farish v. State Banking Board*, 235 U. S. 498, 512; *Richardson v. Fajardo Sugar Co.*, 241 U. S. 44, 47; *Missouri v. Fiske*, 290 U. S. 18, 24.

It may be well to add that the construction given the Oklahoma statute leaves open the road to review in this Court on constitutional grounds after the issues have been passed upon by the state courts. *Chandler v. Dix*, 194 U. S. 590, 592; *Smith v. Reeves*, 178 U. S. 436, 445.

The judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court with directions to dismiss the complaint for want of jurisdiction.

Mr. Justice FRANKFURTER, with whom the CHIEF JUSTICE and
Mr. Justice ROBERTS concur, dissenting.

To avoid the imposition of penalties and other serious hazards, the plaintiff paid money under claim of a tax which Oklahoma, we must assume, had no power to exact. Concededly, he could sue to recover the moneys so paid to the defendant, a tax collector, in a state court in Oklahoma. But to allow the suit to be brought in a federal court sitting in Oklahoma would derogate, this Court now holds, from the sovereignty of Oklahoma. Such a result, I believe, derives from an excessive regard for formalism and from a disregard of the whole trend of legislation, adjudication and

legal thought in subjecting the collective responsibility of society to those rules of law which govern as between man and man.

To repeat, this is a simple suit to get back money from a collector who for present purposes had no right to demand it. So far as the federal fiscal system is concerned, this common law remedy has been enforced throughout our history, barring only a brief interruption.¹ See *United States v. Nunnally Investment Co.*, 316 U. S. 258. And if, instead of avoiding the serious consequences of not paying this state tax, the plaintiff had resisted payment and sought an injunction against the tax collector for seeking to enforce the unconstitutional tax, under appropriate circumstances the federal courts would not have been without jurisdiction. See, e.g., *Western Union Telegraph Co. v. Trapp*, 186 Fed. 114; *Ward v. Love County*, 253 U. S. 17; *Carpenter v. Shaw*, 280 U. S. 363. Finally, as I read the opinion of the Court, even a suit of this very nature for the recovery of money paid for a disputed tax will lie against the collector in what is called his individual capacity; that is, a suit against the same person on the same cause of action for the same remedy can be brought, if only differently entitled. In view of the history of such a suit as this and of the incongruous consequences of disallowing it in the form in which it was a case in the federal court in Oklahoma, the claims of sovereignty which are sought to be respected must surely be attenuated and capricious.

The Eleventh Amendment has put state immunity from suit into the Constitution. Therefore, it is not in the power of individuals to bring any State into court—the State's or that of the United States—except with its consent. But consent does not depend on some ritualistic formula. Nor are any words needed to indicate submission to the law of the land. The readiness or reluctance with which courts find such consent has naturally been influenced by prevailing views regarding the moral sanction to be attributed to a State's freedom from suability. Whether this

¹ The Swartwout scandal led to the Act of March 3, 1839 (§ 2, 5 Stat. 339, 348), which this Court construed as a withdrawal of the suability of the collector. *Cary v. Curtis*, 3 How. 236. That decision was rendered on January 21, 1845, and Congress promptly restored the old liability. Act of Feb. 26, 1845, c. XXII, 5 Stat. 727. See Brown, *A Dissenting Opinion of Mr. Justice Story* (1940) 26 Va. L. Rev. 759. Again, in view of the complicated administrative problems raised by the invalidation of the Agricultural Adjustment Act, Congress devised a special scheme for the recovery of the illegal exactions made under the Act. 49 Stat. 1747, 7 U. S. C. § 644 *et seq.*; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337.

immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, see *Kawanakoa v. Polyblank*, 205 U. S. 349, it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief, expressed nearly fifty years ago, that "it is a wholesome sight to see 'the Crown' sued and answering for its torts." 3 Maitland, Collected Papers, 263.²

Assuming that the proceeding in this case to recover from the individual moneys demanded by him in defiance of the Constitution is a suit against the State, compare *Ex parte Young*, 209 U. S. 123, 155; *Atchison, &c. Ry. Co. v. O'Connor*, 223 U. S. 280, Oklahoma has consented that he be sued. The only question therefore is as to the scope of the consent. Has she confined the right to sue to her own courts and excluded the federal courts within her boundaries? She has not said so. Is such restriction indicated by practical considerations in the administration of state affairs? If it makes any difference to Oklahoma whether this suit against a tax collector is pressed in an Oklahoma state court rather than in a federal court sitting in Oklahoma, the difference has not been revealed. There is here an entire absence of the considerations that led to the decision in *Burford v. Sun Oil Co.*, 319 U. S. 315. There it was deemed desirable, as a matter of discretion, that a federal equity court should step aside and leave a specialized system of state administration to function. Here the suit in a federal court would not supplant a specially adaptable state scheme of administration nor bring into play the expert knowledge of a state court regarding local conditions. The subject matter and the course of the litigation in the federal court would be precisely the same as in the state court. The case would merely be argued in a different building and before a different judge. Language restrictive of suit in a federal court is lacking, and intrinsic policy does not suggest restrictive interpretation to

² "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." Doubtless this statement of Dicey's, *Law of the Constitution*, 8th Ed. at p. 189, 9th Ed. at p. 193, was an idealization of actuality. But in the perspective of our time its validity as an ideal has gained and not lost.

withdraw from a federal court questions of federal constitutional law.

Legislation giving consent to sue is not to be treated in the spirit in which seventeenth century criminal pleading was construed. Only by such overstrained rendering of the Oklahoma Statute does the Court finally achieve exclusion of the right of the plaintiff to go to a federal court. To the language of that Statute I now turn. By § 12665 Oklahoma Statutes, 1931, the State authorized an action to recover moneys illegally exacted as a tax, in a situation like the present, where the exaction is one "from which the laws provide no appeal". The relevant jurisdictional provision is as follows: "All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein" The part that the federal courts play in the grant of such jurisdiction by the States is not a new problem. With his customary hard-headedness Chief Justice Waite, for this Court, stated the guiding consideration in ascertaining the relation of the federal court within a State to the judicial process recognized by that State: "While the Circuit Court may not be technically a court of the Commonwealth, it is a court within it; and that, as we think, is all the legislature intended to provide for." *Ex parte Schollenberger*, 96 U. S. 369, 377. This conception of a federal court as a court within the State of its location has ever since dominated our decisions. See, e.g., *Traction Company v. Mining Company*, 196 U. S. 239, 255-56; *Neirbo Co. v. Bethlehem Corp.*, 308 U. S. 165, 171. It is a conception which has been acted upon by state legislatures. For jurisdictional purposes federal courts have been assimilated to the courts of the States in which they may sit. When we are dealing with jurisdictional matters legislation should be interpreted in the light of such professional history. Even if an ambiguity could be squeezed out of a grant of jurisdiction which applies so aptly to a federal court in Oklahoma as to an Oklahoma state court—"suits shall be brought in the court having jurisdiction thereof"—neither logic nor history nor reason counsels an interpretation that attributes to the State hostility against a suit in a federal court on an exclusively federal right as to which the last say in any event belongs to a federal court.³

³ Of course the State can at any time withdraw its consent to be sued. See *Beers v. State of Arkansas*, 20 How. 527. But statutes have steadily enlarged the range of a state's suability and rarely has there been a recession.

In the past, even when the jurisdictional grant has been couched in language giving substantial ground for the argument of restriction of jurisdiction to the state court, this Court has not found denial by a State of the right to go to a federal court within that State when it in fact opened the door of its own courts. Thus, in *Traction Company v. Mining Company, supra*, a Kentucky statute required, among other things, appointment of commissioners in a condemnation proceeding by the county court, examination of the report at its first regular term, issuance of orders in conformity with the Kentucky Civil Code of Practice and allowance of appeals from the county courts. And yet this Court held, as a matter of construction, that it was "not to be implied from the statute in question that the State intended to exclude . . . the Federal courts". 196 U. S. at 256. The Section now under consideration is only one of several statutory provisions for challenging like tax assessments in courts. In all the other provisions, the jurisdiction is explicitly given only to state courts. See, e.g., §§ 12651, 12660, 12661. If in § 12665 Oklahoma has seen fit to allow suits to be brought "in the court having jurisdiction thereof", which as a matter of federal jurisdictional law certainly includes the federal court in Oklahoma, and has not seen fit to designate the state courts for such jurisdiction, why should this Court interpolate a restriction which the Oklahoma Legislature has omitted? The fact that the Legislature has also provided that such suits "shall have precedence" is no more embarrassment to federal jurisdiction than to state jurisdiction. That is merely an admonition to courts of the importance of disposing of litigation affecting revenue with all convenient dispatch. Nor is there any other provision of the Statute giving this right of action that remotely requires a procedure to be followed or relief to be given peculiar to state courts or different from established procedure and relief in the federal courts. Only on the assumption that federal courts are alien courts is there anything in § 12665 that is not as suited to a proceeding in a federal court as it is to one in a state court.

The situation thus presented by the Oklahoma legislation is very different from that which was here in *Chandler v. Dix*.

See, generally, Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform* (1934) 20 A. B. A. J. 747; Borchard, *Governmental Responsibility in Tort* (1926) 36 Yale L. J. 1, 17, (1927) 36 Yale L. J. 757, 1039. (1928) 28 Col. L. Rev. 577, 735.

194 U. S. 590. There a suit was brought against state officials to remove a cloud on title to lands claimed by the State. The relief that was sought and the procedure for pursuing it plainly indicated "that the legislature had in mind only proceedings in the courts of the State. A copy of the complaint is to be served upon the prosecuting attorney, who is to send a copy thereof within five days to the Auditor General, and this is to be in lieu of service of process. It then is left to the discretion of the Auditor General to cause the Attorney General to represent him, and it is provided that in such suits no costs shall be taxed. These provisions with regard to procedure and costs show that the statute is dealing with a matter supposed to remain under state control. . . . [The] statute does not warrant the beginning of a suit in the Federal court to set aside the title of the State." 194 U. S. at 591-592. The marked difference between the Michigan Statute and this Oklahoma Statute is further evidenced by the fact that § 12665 gives an action to recover not merely illegal state taxes but also taxes of the "county or sub-division of the county" that have been illegally collected. But counties or their subdivisions do not enjoy immunity from suit. *Lincoln County v. Luning*, 133 U. S. 529; *Port of Seattle v. Oregon & W. R. R.*, 255 U. S. 56, 71. If the other jurisdictional requirements are present, they can be sued in a federal court without the leave of Oklahoma. It is not, I submit, a rational way to construe the Oklahoma Statute, dealing with a particular type of illegal exaction, raising the same kind of issue and involving the same procedure, so as to recognize jurisdiction of federal courts over suits against the county and its sub-division but to find a purpose to exclude suits as to illegal state exactions.

I have proceeded on the assumption that the action below was under § 12665, and as such an action against the State. But the suit was not brought under § 12665. It was brought as an ordinary common law action for the recovery of money against an officer acting under an unconstitutional statute. The defendant answered the suit, but did not claim the State's immunity from suit and the court's resulting lack of jurisdiction. What is even more significant is that he did allege lack of jurisdiction on another ground not now relevant. In a word, the defendant did not claim, on behalf of the State, the immunity which this Court now affords him. He did not even make this claim at the pre-

trial conference and the claim did not emerge as one of the issues defined by the pre-trial conference under Rule 16. In disposing of the case, the Judge interpreted the action as having been brought under § 12665, although the pleadings gave no warrant for such conclusion, and on such interpretation, he found that the defendant could claim and had not waived Oklahoma's immunity. Evidently, however, the District Court was content with its own finding of want of "jurisdiction" for it proceeded to dispose of the constitutional issues on their merits. I think that the claim of the State's immunity was not in the case under *Illinois Central Railroad Co. v. Adams*, 180 U. S. 28, which held that in a suit nominally against an individual sovereign immunity is a defense that must be raised by appropriate pleading. Doubtless for this reason, the jurisdictional question on which the case is now made to turn was not even discussed by the Circuit Court of Appeals.

That court, I believe, ~~rightly in passing~~ on the constitutional merits, but since the case here goes off on jurisdiction, I intimate no views upon them.

properly passed